

Circuit Court of the United States.

DISTRICT OF MASSACHUSETTS.

IN EQUITY.

NO. 1933.

WILLIAM H. KENNEDY et al.,

v.

JOHN McTAMMANY, Jr.

Transcript of Record.
~~EVIDENCE FOR COMPLAINANTS.~~

TAUNTON:

~~PRINTED BY O. A. HAGE & SON.~~

1887.

TABLE OF CONTENTS.

	Page
Court and Title of Cause	1
Bill of Complaint	12
Demurrer.	13
Joinder in Demurrer	14
Demurrer sustained	14
Amended Bill of Complaint	21
Defendant's Demurrer to Amended Bill	22
Demurrer overruled	22
Answer	23
Replication.	34
Stipulation as to Testimony of William H. Kennedy	35
Final Decree and Appeal.	

EVIDENCE FOR COMPLAINANTS.

Deposition of William A. Webber	36
" " William E. Rand	54
" " Gilbert A. Daggett.	57
" " George Swift.	64
" " George B. Kelly.	82
" " Edwin W. Brown	91

EVIDENCE FOR DEFENDANT.

Deposition of Herman P. Chelius	119
" " Julius Eichberg.	126
" " Eben Tourjee.	130
" " Alexander McTammany	135
" " George Fisher	140
Opinion of the Court.	146
Assignment of Errors & Prayer for Reversal	149
Clerk's Certificate	151
Bond to Party on Appeal.	152

UNITED STATES OF AMERICA.

MASSACHUSETTS DISTRICT, ss.

At a Circuit Court of the United States
for the First Circuit begun and holden at
Boston, within and for the District of Massa-
chusetts, on Saturday, the fifteenth day of
October in the year of our Lord one thousand
eight hundred and eighty seven.

Before

The Honorable LeBARON B. COLT,
Circuit Judge.

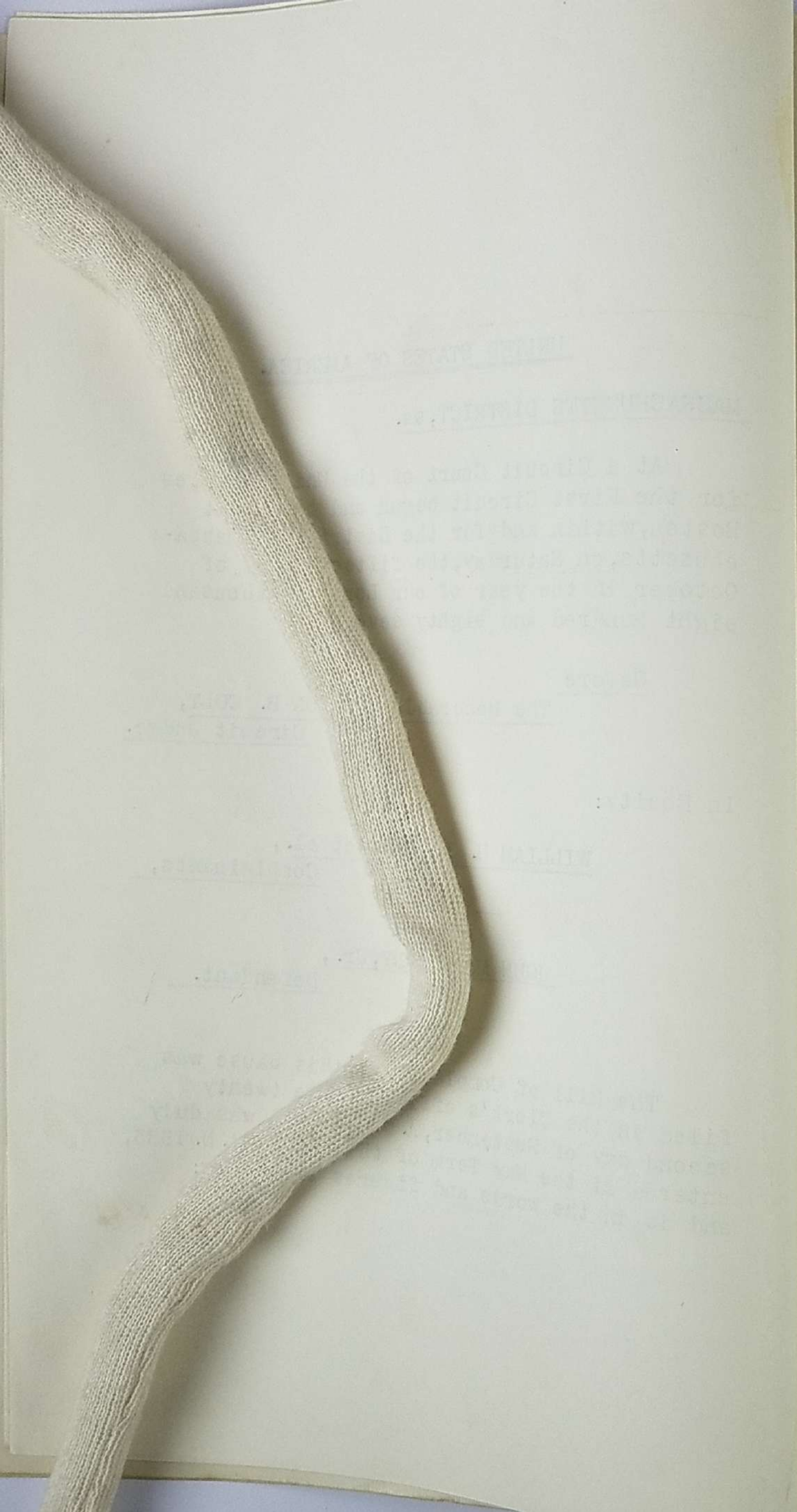
In Equity:

WILLIAM H. KENNEDY et al.,
Complainants,

— v. —

JOHN McTAMMANY, Jr.,
Defendant.

The Bill of Complaint in this cause was
filed in the Clerk's office on the twenty
second day of September, A. D. 1883, and was duly
entered at the May Term of this Court, A. D. 1883,
and is in the words and figures following:



~~Circuit Court of the United States,~~

~~DISTRICT OF MASSACHUSETTS.~~

~~IN EQUITY.~~

~~No. 1938.~~

BILL OF COMPLAINT.

[Filed Sept. 22, 1883.]

To the Judges of the Circuit Court of the United States for the District of Massachusetts.

William H. Kennedy, of Brooklyn, in the County of Kings and State of New York, a citizen of said State of New York and of the United States, and the Automatic Music Paper Company, a corporation duly organized and established by law under the Laws of the State of Massachusetts and located in the City of Boston, in said District, bring this their Bill of Complaint against John McTammany, Jr., a resident and citizen of Worcester, in the County of Worcester, in said District, and thereupon your orators complain and say:

I. That your orator, said Kennedy, who is known in musical and dramatic circles as Harry Kennedy, being then and at all times herein or hereinafter set forth a citizen of and resident in these United States of America, was and is the first and original owner, composer, writer and inventor of the words and music of a certain song, musical composition, score and book entitled "Cradle's Empty, Baby's Gone."

II. That on or about the 23d day of August, A. D. 1880, and before the publication thereof, your orator, said Kennedy, did deliver at the office of the Librarian of Congress at Washington, in the District of Columbia, a printed copy of the title or description of the said song, musical composition, score and book in these words—

"Cradle's Empty, Baby's Gone."

"Song and Chorus."

"Words and Music by Harry Kennedy."

3
4
BILL OF COMPLAINT.

and that on the same twenty-third day of August, A. D. 1880, your orator, said Kennedy, did deliver at the office of said Librarian of Congress two complete printed copies of such copyrighted book, musical composition, and score of the best edition issued, as the statute requires; and thereupon the said Librarian of Congress at said Washington did forthwith record the name, description and title of said book, song, musical composition and score in a book kept for that purpose and in conformity with the Laws of the United States respecting copyrights, all of which appears from the certificate of said Librarian, of which a true copy is hereto annexed marked A.

III. That thereupon and on said 23d day of August, A. D. 1880, and thereafter, due notice was given by your orator, said Kennedy, of the said copyright, by inserting in each and every of the copies and of every edition thereof published, on the title page and on the page immediately following the title, the words

"Copyright 1880, by Wm. H. Kennedy."

IV. That your orator, said Kennedy, before and since the publication of said book, musical composition, song, words and music, has fully complied with and duly fulfilled all the requirements and provisions of the law and rules in and for such cases made and provided, and became and is entitled to and acquired the sole right and liberty to print, re-print, publish, vend and copy the said book, musical composition, score, song, words and music, for the period of twenty-eight years from the said 23d day of August, A. D. 1880, the time of recording such title, and that said time has not yet expired, nor had it expired at the time of the infringement and piracies hereinafter set forth.

V. That the said book, song, musical composition, score, words and music has been printed, published and supplied to the public at great cost of valuable time in the preparation of the manuscript and at great expense to your orator, said Kennedy, in its publication; and your orator, said Kennedy, has been in receipt of large sums of money from the proceeds of the sales of said book, song, musical composition, score, words and music, to reimburse his expenses, and remunerate his labor and care bestowed upon the same.

VI. That by recent ingenious inventions and discoveries in musical instruments and appliances for the performance of musical composi-

Page 4

5

BILL OF COMPLAINT.

tions on such instruments, a musical composition may be performed upon certain musical instruments called and known as orguinettes, organettes and organinas, by means of long sheets or strips of perforated paper, which said sheets or strips of paper are constructed with perforations through which the passage of air coming in contact with reeds or other sounding devices produces a performance of a musical composition. Such musical instruments consist briefly of an exhaust bellows, wind chest, musical reeds arranged in a line across the instrument and according to the scale desired, reed chambers communicating with said wind chest and air passages or ducts leading from said reed chambers, one to each reed chamber, to the outside of a table or raceway on and over which, by a suitable feeding mechanism, the sheet or strip of perforated paper is caused to move through the instrument across the line of the outer ends of said air passages or ducts.

The perforations in said sheet or strip are in longitudinal rows, one to each of said air passages, and each row corresponding to a note of the musical scale of the instrument, and with a proper operation of the bellows and the feeding mechanism for said sheet or strip, said sheet or strip is caused to travel through the instrument and over the outer ends of said air passages, and as a perforation in said sheet or strip as it so travels through the instrument, comes to and passes over its respective air passage, air will pass through said passage (because of the operation of the bellows exhausting the air from the wind chest) to the musical reed and sound the same, and thus with an arrangement of the perforations in said strip or sheet according to and corresponding with the melody or tune and the scale of the musical reeds in the instrument, the said melody or tune will be performed upon said instrument.

VII. Your orator, said Automatic Music Paper Company, has been and is largely engaged in the manufacture and publication of the sheets or strips of paper so adapted to such musical instruments by such perforations corresponding to the score of such musical compositions as are desired to be performed upon such instruments.

VIII. In the prosecution of their said business your orator, said Automatic Music Paper Company, have sought to obtain licenses from the authors and proprietors of copyrighted musical compositions, and in consideration of certain royalties paid by said company to said

Kennedy, said company on or about the first day of June, A. D. 1882, received from said Kennedy an exclusive license to make, publish and vend said sheets or strips of paper designed for such musical instruments by perforations corresponding to the score of his copyrighted musical composition entitled as aforesaid "Cradle's Empty, Baby's Gone;" and due notice has been given by your orator, said Automatic Music Paper Company, upon each and every of said perforated sheets or strips of paper so made, published and sold by them, by printing upon each and every of said sheets or strips the words, "Cradle's Empty, Baby's Gone. Copyright 1880, by Will. H. Kennedy; used by permission of Will. H. Kennedy, Brooklyn."

IX. That the defendant well knowing the premises and that your orator, said Kennedy, was the author of said musical composition, score and music, and the proprietor of said copyright, and that your orator, said Automatic Music Paper Company, was the sole and exclusive licensee of the right to make, publish and vend said musical composition and score in the form which the same is or may be produced upon said sheets or strips of perforated paper, one of which, with the score of said copyrighted musical composition represented in the arrangement of its perforations is filed with this bill and marked Exhibit B; and well knowing that both your orators are largely interested in the sale of said perforated sheets containing said musical composition and score, and wrongfully intending to infringe and pirate said copyright and the said copyrighted musical composition and score of which your orator, said Kennedy, is author and proprietor, and said company his exclusive licensee as aforesaid, as said defendant well knew, deliberately and after due notice did on or about the eighteenth day of May, A. D. 1883, and at divers times both before and since said eighteenth day of May, A. D. 1883, without the allowance or consent of either of your orators, and in open violation of their rights did make, prepare, publish and sell said musical composition and the score of said music in the form of perforated sheets copied from those sold by said company under said license then and now copyrighted by your orator, said Kennedy, and by him licensed to said company.

X. That said perforated sheets containing the score of the music of said musical composition and song as aforesaid so manufactured,

published and sold by defendant, are a piracy of the copyrighted work and composition of your orator, said Kennedy, and contain the musical composition and musical score of the work and book owned and copyrighted by your orator, said Kennedy, almost verbatim.

XI. That your orators have sustained great damage, detriment and injury from the infringement and piracy herein referred to, and have warned defendant to desist from said infringement and piracy, but that defendant has neglected and refused, and still neglects and refuses, to desist from said infringement and piracy, notwithstanding.

XII. That defendant has sold large numbers of said infringement and piracy, to wit, the said perforated sheets containing the musical score of said book, musical composition and song, by him, said defendant, manufactured, published and sold, under the name and title "Cradle's Empty, Baby's Gone. Song and Chorus. Words and Music by Harry Kennedy," in violation of the Acts of Congress of the United States relating to copyrights, and have made great profits for himself thereby; all of which actings, doings and pretences are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orators in the premises.

XIII. To the end, therefore, that the said defendant may, if he can, show cause why your orators should not have the relief hereby prayed for, and may, upon his corporal oath and according to the best and utmost of his knowledge, remembrance, information and belief, full, true, direct and perfect answer make to the several interrogatories hereinafter numbered and set forth—that is to say:

1. Whether it is not a fact that this complainant, said Kennedy, is the author, composer and writer of the words and music of the book, musical composition and song entitled, "Cradle's Empty, Baby's Gone.

2. Whether it is not a fact that this complainant, said Kennedy, did, before the publication thereof, and on the 23d day of August, 1880, deliver at the office of the Librarian of Congress, at Washington, in the District of Columbia, a printed copy of the title or description of said song, musical composition and book in these words: "Cradle's Empty, Baby's Gone. Song and Chorus. Words and Music by Harry Kennedy.

BILL OF COMPLAINT.

8

3. Whether it is not a fact that this complainant, said Kennedy, did thereafter, and on the 23d day of August, 1880, and within ten (10) days from the publication thereof, deliver at the office of the Librarian of Congress, at Washington, in the District of Columbia, two complete printed copies of such copyrighted book, song and musical composition of the best edition issued, as the statute requires.

4. Whether it is not a fact that thereupon and on said 23d day of August, 1880, the said Librarian of Congress, at Washington, in the District of Columbia, did forthwith record the name, description and title of said song, musical composition, words and music, in a book kept for that purpose, in conformity with the laws of the United States respecting copyrights.

5. Whether it is not a fact that thereupon and on said 23d day of August, 1880, and thereafter, notice was duly given by your complainant, said Kennedy, of the said copyright by inserting in each and every of the copies and of every edition thereof published, on the title page, and on the page immediately following the title, the words, "Copyright, 1880, by William H. Kennedy."

6. Whether or not it is a fact that this complainant, said Automatic Music Paper Company, has since said first day of June and always since receiving from said Kennedy said license to make, publish and vend said perforated sheets or strips of paper designed for musical instruments as aforesaid given due notice of said copyright by printing upon each and every of said sheets or strips the words "Cradle's Empty, Baby's Gone. Copyright 1880, by Will. H. Kennedy. Used by permission of Will. H. Kennedy, Brooklyn."

7. Whether or not it is a fact that musical instruments are constructed in large numbers and that perforated sheets or strips of paper are manufactured and so adapted to such musical instruments by such perforations corresponding to the score of such musical compositions as are desired to be performed upon such musical instruments substantially as described in this bill.

9. Whether or not the defendant has made, published and sold such perforated sheets entitled, "Cradle's Empty, Baby's Gone," substantially like those sold by said Automatic Music Paper Company under said title.

10. Whether or not it is a fact that defendant has sold perforated sheets or strips of paper so adapted to such musical instruments as have been described in this bill as to produce substantially on said instruments the same musical composition as that written, composed, owned and copyrighted by Complainant Kennedy, entitled "Cradle's Empty, Baby's Gone."

11. Whether or not it is a fact that defendant has sold such sheets or strips of perforated paper with the imprint thereon of the words, "Cradle's Empty, Baby's Gone."

12. Whether or not it is a fact that such sales have been without the consent or authority of these complainants or either of them.

Your orators pray that the defendant be compelled, by a decree of this Honorable Court, to account for and pay over to your orators all such gains and profits as have accrued or arisen to or have been earned or received by the defendant, or to which they may be entitled by reason of such unlawful manufacturing, publishing and selling of the piratical infringement of the copyrighted book, song and musical composition of your orator, said Kennedy, entitled "Cradle's Empty, Baby's Gone," by means of said perforated strips or sheets of paper, and all such gains and profits as your orators would have received but for said unlawful acts and doings of the said defendant, and such damage as by said unlawful and wrongful acts they have sustained. And may it please your Honors to direct and decree that the defendant discover and disclose how many copies of the piratical infringement manufactured and published by defendant of the said copyrighted song, book and musical composition of your orator, said Kennedy, called "Cradle's Empty, Baby's Gone," by means of said perforated strips or sheets of paper, the said defendant has on hand or had on hand unsold at the time of the filing of this bill.

And may it please your Honors to decree that such copies on hand be delivered up to be canceled and destroyed.

And may it also please your Honors, the premises being considered, to grant unto your orators the writ of injunction issuing out of and under the seal of this Honorable Court, or issued by one of your Honors according to the form of the statute in and for such cases made and provided, perpetually enjoining and restraining the said defendant, his clerks, attorneys, agents, servants, workmen, and each

and every other person and persons by his leave or with or by his consent or authority from, directly or indirectly, manufacturing, publishing, selling, exposing for sale, giving away or distributing any copies of the perforated strips or sheets of paper of the book, song and musical composition called "Cradle's Empty, Baby's Gone," written, composed, owned and copyrighted by your orator, said Kennedy.

And that your orators may have such other or further order, judgment or relief in the premises as the nature of the circumstances of this case may require, and to this Honorable Court shall seem meet, just and equitable.

And may it please your Honors to grant unto your orators a provisional or preliminary injunction issuing out of and under the seal of this Honorable Court, or issued by one of your Honors according to the form of the statute in and for such cases made and provided, enjoining and restraining the said defendant, his clerks, attorneys, agents, servants, workmen, and each and every other person and persons by his leave or with or by his consent to the same purport, tenor and effect hereinbefore prayed for in regard to said perpetual injunction.

And may it please your Honors to grant unto your orators a writ of subpoena of the United States of America issued out of and under the seal of this Honorable Court, directed to the said John McTammany, commanding him on a day certain, therein to be named, and under a certain penalty, to be and appear in this Honorable Court, then and there to answer to all and singular the premises, and to stand to and to perform and abide such further order, direction and decree as may be made against him.

WILLIAM H. KENNEDY,
AUTOMATIC MUSIC PAPER CO.,
By GEO. B. KELLY, *Pres.*

AUGUSTUS RUSS,
of Counsel.

[SEAL]

HENRY E. NELMES,
Notary Public, Kings Co.

Exhibit A.

[L. S.]

LIBRARY OF CONGRESS.

No. 12,958 L.

COPYRIGHT OFFICE, WASHINGTON.

To wit: Be it Remembered,

That on the 23d day of August, anno domini 1880, Will. H. Kennedy, of Brooklyn, N. Y., deposited in this office the title of a Musical Composition, the title or description of which is in the following words, to wit:

Cradle's Empty, Baby's Gone.

Song and Chorus.

Words and Music by

Harry Kennedy,

the right whereof he claims as proprietor, in conformity with the Laws of the United States respecting Copyrights.

(Signed,) A. R. SPOFFORD,

Librarian of Congress.

Two copies of the above publication deposited August 23, 1880.

I, A. R. Spofford, Librarian of Congress, hereby certify that the foregoing is a true copy of the original record of copyright in the Library of Congress.

In witness whereof I have hereto set my hand and affixed the seal of my office this 21st day of June, 1883.

[L. S.]

A. R. SPOFFORD,

Librarian of Congress.

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK, } ss.
STATE OF NEW YORK,
City of Brooklyn, County of Kings.

William H. Kennedy, being duly sworn, says: I am the complainant in the foregoing bill named. I have read the same and know the contents thereof. The same is true of my own knowledge except as to those matters which are therein stated to be alleged upon information and belief, and as to those matters I verily believe it to be true.

WILLIAM H. KENNEDY.

Subscribed and sworn to before me, {
this 31st day of July, 1883, }

[SEAL]

HENRY E. NELMES,

Notary Public, Kings Co.

DEMURRER.

12

UNITED STATES OF AMERICA, }
DISTRICT OF MASSACHUSETTS, } ss.
County of Suffolk.

George B. Kelly, being duly sworn, deposes and says: I am the President of the Automatic Music Paper Company, one of the complainants named in the foregoing bill. I have read the said bill and know the contents thereof. All the allegations of said Automatic Music Paper Company therein contained, I know of my own knowledge to be true, and all other allegations in said bill I believe to be true.

AUTOMATIC MUSIC PAPER CO.,
By GEO. B. KELLY, *Pres.*

Subscribed and sworn to before me, }
this 27th day of August, A.D. 1883, }

[SEAL]

EDWIN W. BROWN,

Notary Public.

This cause entered as aforesaid was thence continued to the October Term, A.D. 1883, when the following Demurrer was filed:

DEMURRER.

(Filed Nov. 21, 1883.)

Demurrer of the said defendant to the bill of complaint of said William H. Kennedy and others.

This defendant, by protestation, not confessing all or any of the matters and things, in the complainants' bill of complaint contained, to be true, in such manner and form as the same are therein set forth and alleged, doth demur to said bill, and for cause of demurrer shows:

(1) That the said bill doth not contain any matter of equity, upon which this court can ground any decree, or give to the complainants any relief against this defendant.

(2) That the said bill doth not, nor does anything therein, alleged or set forth, show any infringement or piracy whatever of the words, or music, or song, musical composition, score or book, entitled "Cradle's Empty, Baby's Gone," or the alleged copyright thereof—nor of any copyrighted work, or composition, or copyright of the complainants, or either of them, as set forth and alleged in said bill.

(3) That the said bill doth not contain or set forth any matter of equity or thing entitling the complainants to the discovery claimed, or upon which this court ought or can make any decree, or which entitles the complainants to the relief prayed for, as any relief.

(4) That the complainants have not made or stated such a case as entitles them to the relief prayed for, or any relief in a court of equity.

Wherefor, and for other good causes of demurrer appearing in the said bill, the defendant doth demur thereto, and humbly prays the judgment of this court whether he shall be compelled to make any further or other answer to said bill; and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

CHAS. THEO. RUSSELL,

Solicitor and of Counsel for Defendant.

I certify that in my opinion the above demurrer is well founded in point of law.

CHAS. THEO. RUSSELL,

Of Counsel for Defendant.

I, John McTammany, Jr., defendant in the above named cause, on oath do say that the foregoing demurrer is not interposed for delay.

J. MCTAMMANY.

COMMONWEALTH OF MASSACHUSETTS, } ss:
WORCESTER,

Subscribed and sworn to before me this 19th day of November A. D. 1883.

[SEAL]

HENRY F. HARRIS,

Notary Public.

At the said October Term, the following Joinder was filed:

JOINDER IN DEMURRER.

(Filed January 10, 1884.)

And now come said plaintiffs and join issue in law on the demurrer of the defendant filed in said case.

By their Solicitor,

AUGUSTUS RUSS.

14
AMENDED BILL OF COMPLAINT.

This cause thereupon came on to be heard by the Court upon the foregoing demurrer, the Honorable John Lowell, Circuit Judge, sitting.

On the twenty first day of February, A. D. 1884, the Court entered an order sustaining the said demurrer.

This cause was thence continued to the October Term, A. D. 1884, when the following Amended Bill was filed by leave of Court:

AMENDED BILL OF COMPLAINT.

(Filed Oct. 27, 1884.)

To the Judges of the Circuit Court of the United States for the District of Massachusetts.

William H. Kennedy, of Brooklyn, in the county of Kings and State of New York, a citizen of said State of New York and of the United States, and the Automatic Music Paper Company, a corporation duly organized and established by law under the laws of the State of Massachusetts, and located in the city of Boston in said district, bring this their bill of complaint against John McTammany, Jr., a resident and citizen of Worcester in the county of Worcester in said district, and thereupon your orators complain and say :

I. That your orator, said Kennedy, who is known in musical and dramatic circles as Harry Kennedy, being then and at all times herein and hereafter set forth, a citizen of and resident in these United States of America, was and is the author and proprietor of the words and music of a certain song, musical composition, score and book, entitled "Cradle's Empty, Baby's Gone."

II. That on or about the 23d day of August, A. D. 1880, and before the publication thereof, your orator, said Kennedy, did deliver at the office of the Librarian of Congress at Washington, in the District of Columbia, a printed copy of the title or description of the said song, musical composition, score and book in these words: "Cradle's Empty, Baby's Gone. Song and Chorus. Words and music by Harry Kennedy." And that on the same twenty-third day of August, A. D. 1880, your orator, said Kennedy, did deliver at the office of said Librarian of Congress, two complete printed copies of such copyrighted book, musical composition and score of the best edition issued, as the statute requires, and, thereupon, the said Librarian of

Congress at said Washington, did forthwith record the name, description and title of said book, song, musical composition and score, in a book kept for that purpose and in conformity with the laws of the United States respecting copyrights, all of which appears from the certificate of said Librarian, of which a true copy is hereto annexed, marked A.

III. That thereupon and on said 23d day of August, A. D. 1880, and thereafter due notice was given by your orator, said Kennedy, of the said copyright by inserting in each and every of the copies and of every edition thereof published, on the title page and on the page immediately following the title, the words: "Copyright 1880, by Wm. H. Kennedy."

IV. That your orator, said Kennedy, before and since the publication of said book, musical composition, song, words and music, has fully complied with and duly fulfilled all the requirements and provisions of the law and rules in and for such cases made and provided, and became and is entitled to and acquired the sole right and liberty to print, reprint, publish, vend and copy, the said book, musical composition, score, song, words and music, for the period of twenty-eight years from the 23d day of August, A. D. 1880, the time of recording such title, and that said time has not yet expired, nor had it expired at the time of the infringement and piracies hereinafter set forth.

V. That the said musical composition, score, song, words and music, has been printed, published and supplied to the public at great cost of valuable time in the preparation of the manuscript, and at great expense to your orator, said Kennedy, in its publication, and your orator, said Kennedy, has been in receipt of large sums of money from the proceeds of the sales of said book, song, musical composition, score, words and music, to reimburse his expenses, and remunerate his labor and care bestowed upon the same.

VI. That within a few years last past a large market has been created for a new style of sheet music, differing in certain important respects from any sheet music theretofore known; that the ordinary sheet music consists of a sheet of paper or the like with lines across it from side to side, each group of lines being called a staff; that each of these lines and each space between them represents a certain note of the musical scale; that the lines constituting each staff are crossed

by short lines at right angles called bars, and the space between these bars is called a measure, these spaces or measures representing equal portions of time; that certain characters are used in connection with the staff and the bars across the staff, which show by their arrangement with respect to the lines or spaces what note each character represents, and by their form, the duration of that note; that in the new style of sheet music the notes are represented by perforations, instead of characters, and these perforations are arranged in parallel lines extending lengthwise of the paper sheet or strip instead of crosswise as in the ordinary sheet music; that a certain length of perforation is used for a note, half that length for half of that note, and so on; that the measures are indicated by a certain portion of the length of strip, instead of by bars; but that while this new style of sheet music differs in many respects from ordinary sheet music, it yet has a line of perforations lengthwise of the strip for each note, and a perforation for each note, and that the perforations constituting each measure are arranged in a certain space, and that the perforations vary in length as the duration of the notes vary, so that any person skilled in the manufacture of sheet music of the ordinary kind and also skilled in the manufacture of the new style of sheet music, can produce either from the other; and also that any person skilled in the use of ordinary sheet music can readily learn to use the new style of sheet music without the aid of the special musical instrument for which the new style of sheet music is adapted, and that any person familiar with both styles of sheet music can translate either style into the other, and can use the new style just as he could the old style; although the new style is adapted and intended for a use wholly different from any use possible to be made of the old style.

VII. That this new style of sheet music has been largely used for seven or eight years, although it was known as early as 1849, and that it is well shown in Sheet 4 of Letters Patent of the United States, No. 6006, dated January 9th, 1849, granted to Hunt and Bradish, a copy of which is now produced and shown to your Honors.

VIII. That your orator, said Automatic Music Paper Company, has been and is largely engaged in the manufacture, publication and sale of the new style of sheet music, that that is their sole business, and that all such sheet music published and sold by them has been

copied from the old style of sheet music with such alterations as are necessary to suit the compass of the instrument with which the new style of sheet music is to be used; and in the course of their said business, your orator, said Automatic Music Paper Company, have obtained many exclusive licenses from the proprietors of copyrighted musical compositions to copy their copyrighted musical compositions in the new style of sheet music, and to publish and vend such copies, and that in consideration of certain royalties paid by said company, to your orator Kennedy, said company on or about the first day of June, A. D. 1882, received from said Kennedy the exclusive license to copy the musical composition, copyrighted by said Kennedy, as above mentioned, in the new style of sheet music, and to publish and vend such copies, all which by the instrument in writing, duly executed and delivered by said Kennedy, and duly recorded in the office of the Librarian of Congress, now in court produced and shown to your Honors will more fully appear; and due notice has been given by your orator, said Automatic Music Paper Company, upon each and every copy of said musical composition published and sold by them by printing upon each and every copy the words: "Cradle's Empty, Baby's Gone. Copyright 1880 by Will. H. Kennedy; used by permission of Will. H. Kennedy, Brooklyn."

IX. That the defendant well knowing the premises and that your orator, said Kennedy, was the author of said musical composition, score and music, and the proprietor of said copyright, and that your orator, said Automatic Music Paper Company, was the sole and exclusive licensee of the right to copy, publish and vend said musical composition and score in the new style of sheet music, a sample of which and a copy of said copyrighted musical composition is filed with this bill and marked Exhibit B, and well knowing that both your orators are largely interested in the sale of said perforated copies of said musical composition and score, and wrongfully intending to infringe and pirate said copyright and the said copyrighted musical composition and score of which your orator, said Kennedy, is author and proprietor and said company his exclusive licensee as aforesaid, as said defendant well knew, deliberately and after due notice did on or about the eighteenth day of May, 1883, and at divers times both before and since said eighteenth day of May, A. D. 1883, without the

allowance or consent of either of your orators and in open violation of their rights, copy, publish and vend said musical composition, by making, publishing and vending exact copies of the sheet music, made, published and vended by your orator, said Automatic Music Paper Company, under said exclusive license, and still continues so to do; that said defendant has sold large numbers of said copies of said copyrighted musical compositions under the name and title; "Cradle's Empty, Baby's Gone," in violation of the acts of Congress of the United States relating to copyrights, and has made great profit thereby; all of which actings, doings and pretences are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orators in the premises.

X. To the end, therefore, that the said defendant may, if he can, show cause why your orators should not have the relief hereby prayed for, and may, upon his corporal oath and according to the best and utmost of his knowledge, remembrance, information and belief, full, true, direct and perfect answer make to the several interrogatories hereinafter numbered and set forth,—that is to say:

1. Whether it is not a fact that this complainant, said Kennedy, is the author, composer and writer of the words and music of the book, musical composition and song, entitled "Cradle's Empty, Baby's Gone."

2. Whether it is not a fact that this complainant, said Kennedy, did, before the publication thereof, and on the 23d day of August, 1880, deliver at the office of the Librarian of Congress, at Washington in the District of Columbia, a printed copy of the title or description of said song, musical composition and book in these words:

"Cradle's Empty, Baby's Gone,

"Song and Chorus.

"Words and Music

"By Harry Kennedy."

3. Whether it is not a fact that this complainant, said Kennedy, did thereafter, and on the 23d day of August, 1880, and within ten (10) days from the publication thereof, deliver at the office of the Librarian of Congress, at Washington, in the District of Columbia, two complete printed copies of such copyrighted book, song and

musical composition of the best edition issued, as the statute requires.

4. Whether it is not a fact that thereupon and on said 23d day of August, 1880, the said Librarian of Congress, at Washington, in the District of Columbia, did forthwith record the name, description and title of said song, musical composition, words and music, in a book kept for that purpose, in conformity with the laws of the United States respecting copyrights.

5. Whether it is not a fact that thereupon and on said 23d day of August, 1880, and thereafter, notice was duly given by your complainant, said Kennedy, of the said copyright by inserting in each and every of the copies and of every edition thereof published, on the title page, and on the page immediately following the title, the words, "Copyright, 1880, by William H. Kennedy."

6. Whether or not it is a fact, that this complainant, said Automatic Music Paper Company, has since said first day of June, 1882, and always since receiving from said Kennedy said license to copy, publish and vend said copyrighted musical composition in the new style of sheet music above described, given due notice of said copyright, by printing upon each and every of said copies the words: "Cradle's Empty, Baby's Gone. Copyright, 1880, by Will. H. Kennedy; used by permission of Will. H. Kennedy, Brooklyn."

7. Whether or not it is a fact that there is a large market for the new style of sheet music, made by perforating sheets or strips of paper, so that they are substantially copies of and correspond to the score of such musical compositions as are desired to be performed.

Your orators pray that the defendant be compelled, by a decree of this Honorable Court to account for and pay over to your orators all such gains and profits as have accrued or arisen to or have been earned or received by the defendant, or to which they may be entitled by reason of such unlawful copying, publishing and selling of the piratical infringement of the copyrighted book, song and musical composition of your orator, said Kennedy, entitled "Cradle's Empty, Baby's Gone," by means of said perforated strips or sheets of paper, and all such gains and profits as your orators would have received but for said unlawful acts and doings of the said defendant, and such damage as by said unlawful and wrongful acts they have sustained.

And may it please your Honors to direct and decree that the defendant discover and disclose how many copies of the piratical infringement published and sold by defendant of the said copyrighted song, book and musical composition of your orator, said Kennedy, called "Cradle's Empty, Baby's Gone," by means of said perforated strips or sheets of paper, the said defendant has on hand or had on hand unsold at the time of the filing of this bill.

And may it please your honors to decree that such copies on hand be delivered up to be cancelled and destroyed.

And may it please your Honors, the premises being considered, to grant unto your orators the writ of injunction issuing out of and under the seal of this Honorable Court, or issued by one of your Honors according to the form of the statute in and for such cases made and provided, perpetually enjoining and restraining the said defendant, his clerks, attorneys, agents, servants, workmen, and each and every other person and persons by his leave or with or by his consent or authority from, directly or indirectly, manufacturing, publishing, selling, exposing for sale, giving away or distributing any copies of the book, song and musical composition called "Cradle's Empty, Baby's Gone," written, composed, owned and copyrighted by your orator, said Kennedy.

And that your orators may have such other or further order, judgment or relief in the premises as the nature of the circumstances of this case may require, and to this Honorable Court shall seem meet, just and equitable.

And may it please your Honors to grant unto your orators a provisional or preliminary injunction issuing out of and under the seal of this Honorable Court, or issued by one of your Honors according to the form of the statute in and for such cases made and provided, enjoining and restraining the said defendant, his clerks, attorneys, agents, servants, workmen, and each and every other person and persons by his leave or with or by his consent to the same purport, tenor and effect hereinbefore prayed for in regard to said perpetual injunction.

And may it please your Honors to grant unto your orators a writ of subpoena of the United States of America issued out of and under the seal of this Honorable Court, directed to the said John McTam-

many, Jr., commanding him on a day certain, therein to be named, and under a certain penalty, to be and appear in this Honorable Court, then and there to answer to all and singular the premises, and to stand to and to perform and abide such further order, direction and decree as may be against them.

By their Solicitor,

J. E. MAYNADIER.

AUGUSTUS RUSS,

of Counsel.

At the said October Term the following Demurrer was filed:

DEFENDANT'S DEMURRER TO AMENDED BILL.

(Filed Oct. 27, 1884.)

Demurrer of the said defendant to the amended bill of complaint of said William H. Kennedy and others.

This defendant, by protestation, not confessing all or any of the matters and things in the complainants' amended bill of complaint contained, to be true, in such manner and form as the same are therein set forth and alleged, doth demur to said bill, and for cause of demurrer shows:

(1) That the said bill doth not contain any matter of equity, upon which this court can ground any decree, or give to the complainants any relief against this defendant.

(2) That the said bill doth not, nor does anything thorein alleged or set forth, show any infringement or piracy whatever of the words or music or song, musical composition, score or book entitled "Cradle's Empty Baby's Gone," or the alleged copyright thereof, nor any copyrighted work or composition or copyright of the complainants, or either of them, as set forth and alleged in said bill.

(3) That the said bill doth not contain or set forth any matter of equity, or thing entitling the complainants to the discovery claimed or upon which this court ought or can make any decree, or which entitles the complainants to the relief prayed for or any relief.

(4) That the complainants have not made or stated such a case as entitles them to the relief prayed for, or any relief in a court of equity.

ANSWER.

22

Wherefore and for other good causes of demurrer appearing in the said bill, the defendant doth demur thereto and humbly prays the judgment of this court whether he shall be compelled to make any further or other answer to said bill, and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

By his Solicitors,

C. T. & T. H. RUSSELL,
and of Counsel for Defendants.

I certify that in my opinion the above demurrer is well founded in point of law.

CHAS. THEO. RUSSELL,
of Counsel.

I, John McTammany, defendant in the above named cause, on oath do say that the foregoing demurrer is not interposed for delay.

JOHN MCTAMMANY.

WORCESTER, SS.

Subscribed and sworn to before me this twenty-fourth day of October, A. D., 1884.

W. B. HARDING,
Justice of the Peace.

This cause thereupon came on to be heard and was fully heard by the Court on the foregoing demurrer to the amended bill.

On the seventh day of April, A. D. 1885, the Court entered an order overruling the said demurrer.

At the said October Term, the following Answer was filed:

ANSWER.

(Filed May 4, 1885.)

And now comes John McTammany, Jr., the defendant in the above entitled action, reserving to himself any and all rights claimed under the demurrer filed in this case and makes answer as follows:

1st. The defendant does not know of his own knowledge, and has no means of knowing except from the allegations in said bill whether the said Kennedy is a citizen and a resident of the United States of America, nor whether the said Kennedy was and is the

author and composer of the words and music of a certain song, musical composition score and book entitled "Cradle's Empty, Baby's Gone," but will require complainants to prove the same.

2d. The defendant upon his best information and belief denies "that on the 23rd day of August, A. D., 1880, and before the publication thereof the said Kennedy did deliver at the office of the Librarian of Congress at Washington, in the District of Columbia, a printed copy of the title or description of the said song, musical composition, score and book in these words "Cradle's Empty, Baby's Gone. Song and Chorus. Words and Music by Harry Kennedy." And the defendant has no means of knowing except from the allegations contained in said bill, that "on the said 23rd day of August, A. D. 1880, the said Kennedy did deliver at the office of the said Librarian of Congress two complete printed copies of such copyrighted book, musical composition and score, of the best editions issued, as the statute requires, and thereupon the said Librarian of Congress at said Washington, did forthwith record the name, description and title of said book, musical composition and score, in a book kept for that purpose, and in conformity with the laws of the United States respecting copyrights, and the defendant will require the complainants to prove the same.

3d. The defendant can neither admit nor deny that "thereupon and on said 23rd day of August, A. D. 1880, and thereafter due notice was given by said Kennedy of the said copyright by inserting in each and every of the copies and of every edition thereof published, on the title page and on the page immediately following the title the words: 'Copyrighted 1880, by Wm. H. Kennedy.'"

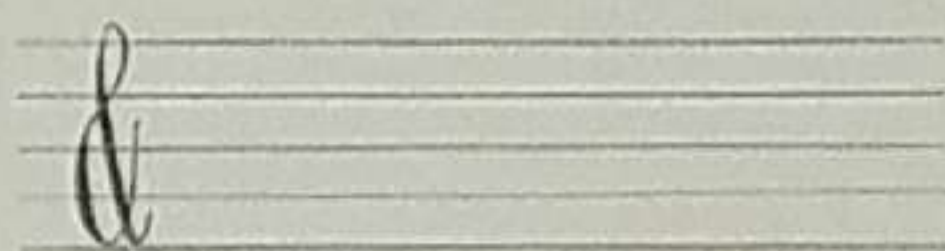
4th. The defendant can neither admit nor deny that the "said Kennedy, before and since the publication of the said book, musical composition, song, words and music, has fully complied with and duly fulfilled all the requirements and provisions of the law and rules in and for such cases made and provided and became and is entitled to and acquired the sole right and liberty to print, reprint, publish, vend and copy the said book, musical composition, score, song, words and music from the said 23rd day of August, A. D., 1880."

5th. The defendant can neither admit nor deny "that the said musical composition, score, song, words and music has been printed and supplied to the public at great cost of valuable time in the preparation of the manuscript and at great expense to the said Kennedy, in its publication, and that the said Kennedy has been in receipt of

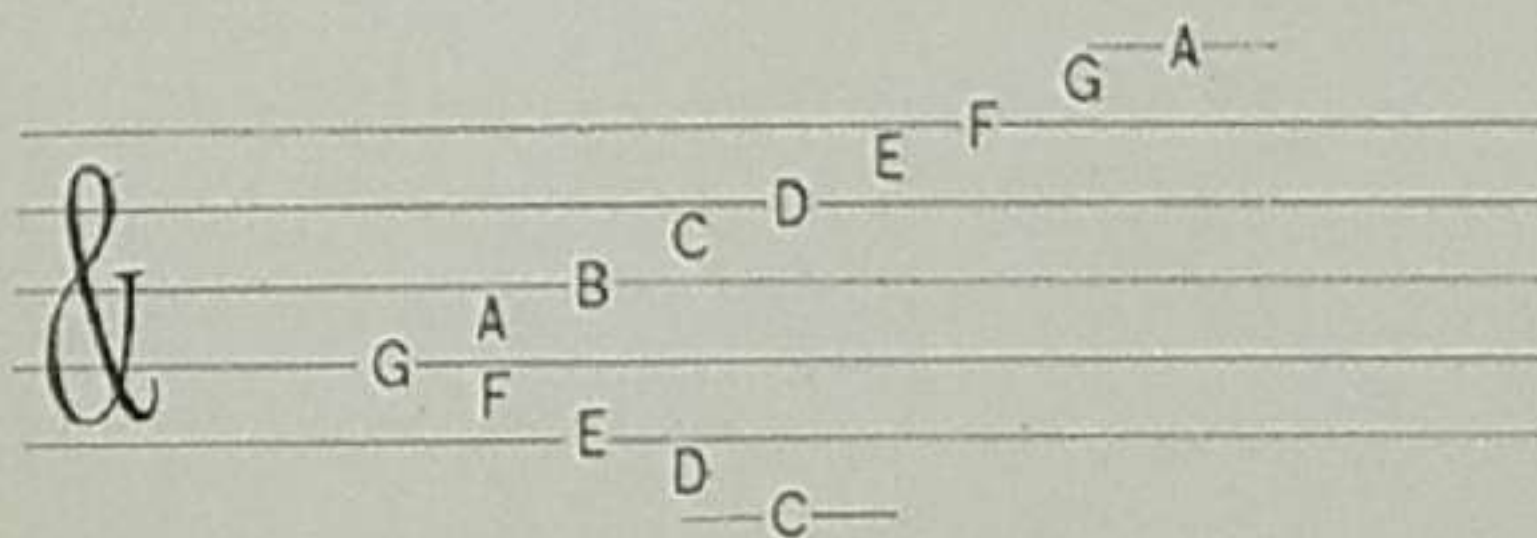
large sums of money from the proceeds of the sales of said book, song, musical composition, score, words and music to reimburse his expenses and remunerate his labor and care bestowed upon the same."

6th. The defendant denies that the exhibit filed by the complainants and marked "B" is a new style of sheet music, but says that the same is a purely mechanical manufacture and an appliance for and a separate and distinct part and portion of a musical instrument, and is not in any sense used as or in the place of sheet music. But he avers that it is true as stated in the original bill that "by means of certain ingenious inventions in musical instruments for the performance of musical compositions on such instruments, a musical composition may be performed upon certain musical instruments called and known as organettes, orguinettes and organinas, &c., by means of long sheets or strips of perforated paper, which said sheets or strips of paper are constructed with perforations through which the passage of air coming in contact with reeds or other sounding devices produce a performance of a musical composition. Such musical instruments consist briefly of an exhaust bellows, wind chest, musical reeds arranged in a line across the instrument, according to the scale desired, reed chambers communicating with said wind chest, and air passages or ducts leading from said reed chambers. one to each reed chamber, to the outside of a table or raceway on and over which, by a suitable feeding mechanism, the sheet or strip of perforated paper is caused to move through the instrument across the line of the outer ends of said air passages or ducts. The perforations in said sheet or strip are in longitudinal rows, one to each of said air passages and each row corresponding to a note of the musical scale of the instrument, and with a proper operation of the bellows and the feeding mechanism for such sheet or strip, said sheet or strip is caused to travel through the instrument and over the outer ends of said air passages, and as a perforation in said sheet or strip as it so travels through the instrument comes to and passes over its respective air passages, air will pass through said passages (because of the operation of the bellows exhausting the air from the wind chest,) to the musical reed and sound the same, and thus with an arrangement of the perforations in said strip or sheet according to and corresponding with the melody or tune, and the scale of the musical reeds in the instruments the melody or tune will be performed upon said

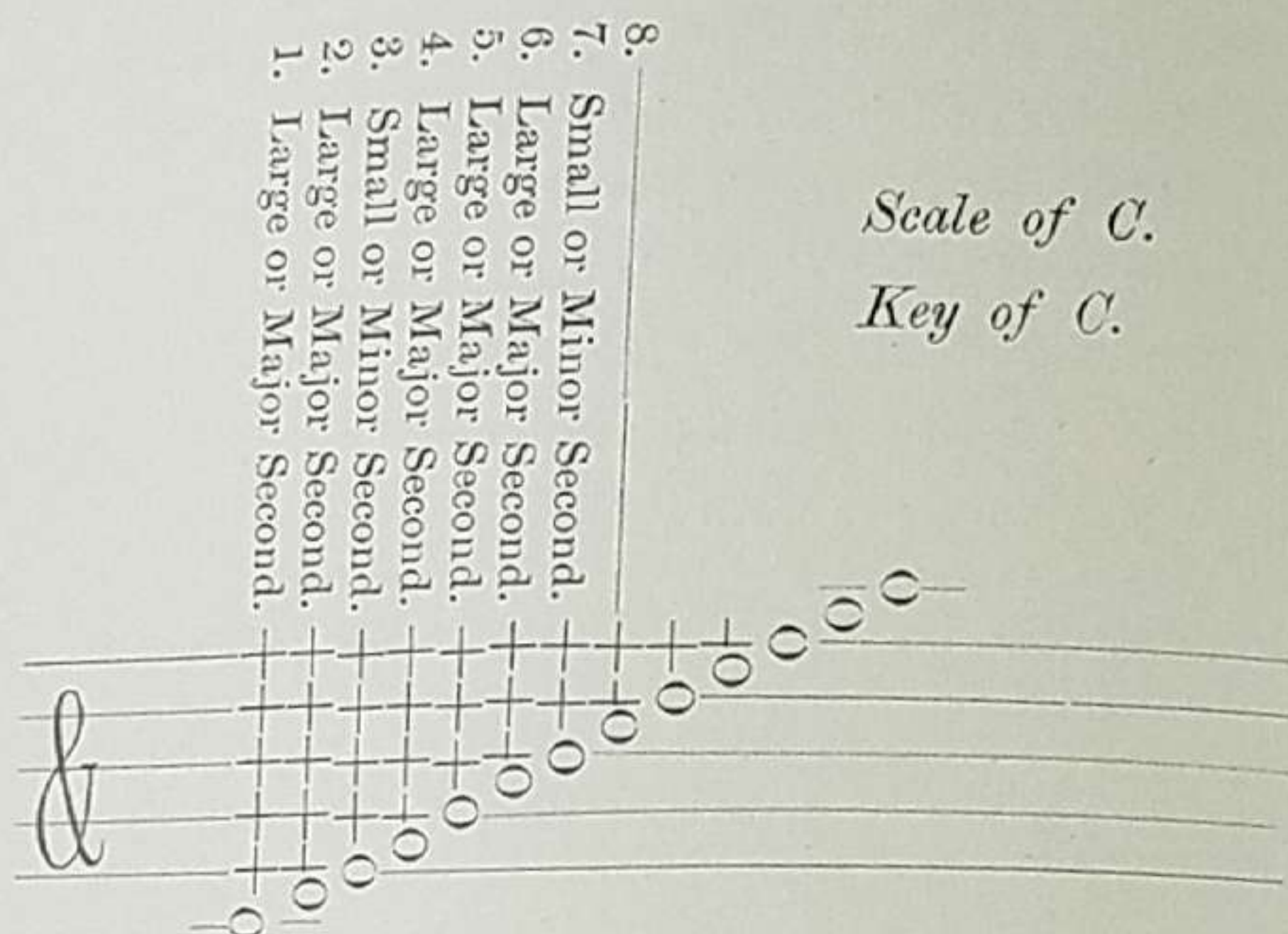
instrument." These musical instruments (the invention of this defendant) make use of an old and well known mechanical appliance in the shape of perforated paper, first patented in this country by Hunt & Bradish, in 1849, as shown in patent 6006, of the United States, and as shown in various foreign patents in England and France. The difference between the musical composition shown in the printed score of the song entitled "Cradle's Empty, Baby's Gone," and the Exhibit of Complainants marked "B" are so great there is no comparison between them. In the printed score of all music the musical staff consists of five parallel lines with their intermediate spaces, each line and space of which is called a *degree*. The staff therefore comprises *nine* degrees, viz: five lines and four spaces. The staff may be extended and the number of degrees augmented by adding short lines above and below as may be desired—such additional lines being commonly called "*leger lines*." The degrees of the staff are named after the first seven letters of the alphabet and the location of these literal names afforded by the letters, is determined by a sign, called a "*Clef*," thus,



which fixes the name "G" to the second line, and it is therefore called the G clef. The literal names given to the degrees of the staff, as located by the G clef, stand thus,



A note, thus *O*, represents a tone. The tones of the scale are represented by notes following each other on consecutive degrees of the staff.

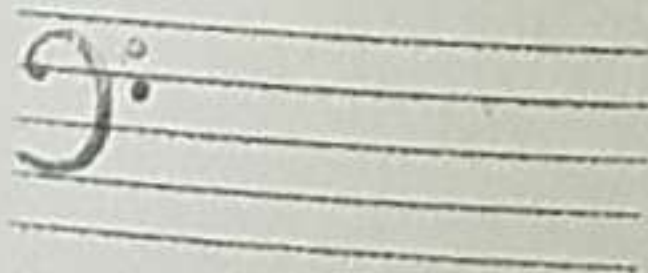


Scale of C.


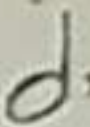

Key of C.

Numerals.	1 2 3 4 5 6 7 8	{ or the names of the tones of the scale as such.
Letters.	C D E F G A B C	{ or the literal names by which the pitch of the tone is designated.
Syllables.	Do Re Mi Fa Sol La Si Do	{ Indicating the vocalities to which the scale is sung.

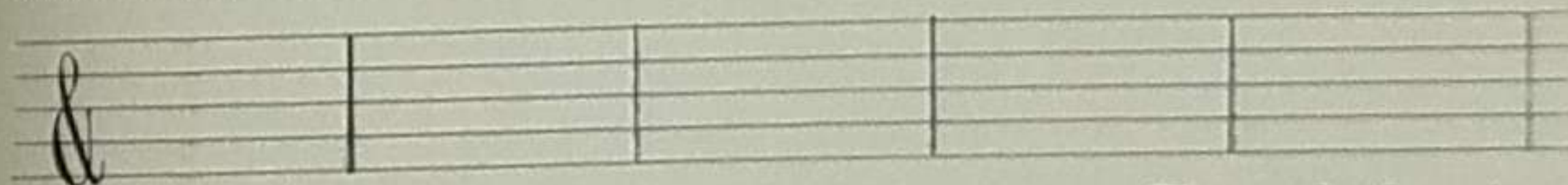
By common consent the first tone of the scale is represented on C the first line below, the second on D, the first space below, third on E the first line, &c. The intervals between the letters corresponds to those between the tones of the scale is illustrated in the diagram. The *pitch* of a tone is designated by the literal name of the degree of the staff on which it is represented. For example, if the note be written on G the pitch of the tone represented thereby is called G, irrespective of any other attribute or quality that may be imparted to the tone. The clef is therefore, essential, for however complete the representation of a tone may be otherwise, *in the absence of a clef the notes on the staff have neither relative nor positive pitch.* The literal names of the degrees of the staff may also be indicated by a sign thus



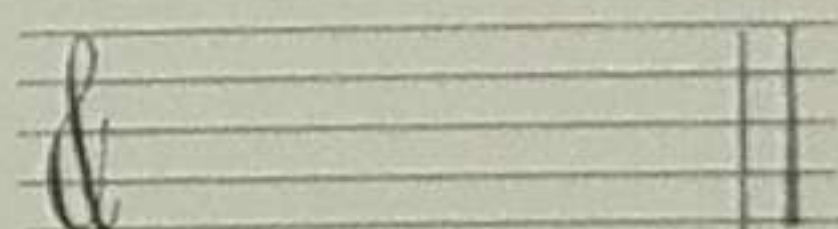
which fixes the place of the letter F and is therefore called the F clef.

Under this sign, F, the clef letter, is on the fourth line and from which the letters are reckoned upward in alphabetical order, and downward by the inversion of that order. In contra distinction to the G and F clef above mentioned, there is also the C clef which locates the pitch of C on the third space. The characters used to represent tones are called *notes*. From the fact that tones may be longer or shorter, arises the necessity for notes of different shapes and names. The note thus , represents the longest tone and is therefore called a *whole note*; that representing a tone half as long, thus , is a *half note*; that representing a tone one quarter the length of the whole note thus  is a *quarter note*, and so with the *eighth note*, the *sixteenth*, *thirty-second* and *sixty-fourth* notes. To each of these notes there is a corresponding *rest*, known as the *whole rest*, *half rest*, *quarter rest*, &c. A *dot* after a note or rest, adds one-half its original length or value, and to this "*dot*" may be added another *dot* which has the effect of adding to the duration of the first note one-half. It will therefore be seen that there are not less than eighteen notes or characters made use of in representing length of tones and an equal number representing silence or rest, or a total of thirty-six characters. There are still other characters that increase or diminish length of notes, but which need not now be enumerated.

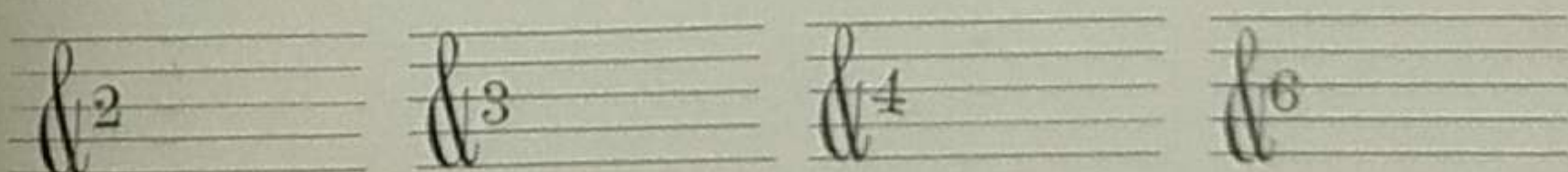
The *accent* in music is technically called *Rythm*. The rythmical structure of a piece of music is indicated by *bars*, or perpendicular lines drawn across the staff thus:



Each space between the *bars* is called a *measure*. The end of a piece of music is indicated by a close thus:



Every measure in music has two, three, four or six *counts*, the number of counts being indicated by a numeral or figure placed next after the clef thus:



Each *kind* of measure is distinguished by the number of counts that may be given it. *Two* counts distinguish one kind, *three* another, *four* another, &c. There are therefore a number of kinds of measures. The foregoing figures indicate that 2, 3, 4 or 6 parts are contained in a measure. Music, also, is *accented* and the accent or pulsation of music is represented by the rythmical structure of the tune, that is the *rythm* enters into the composition of the tune, as such, whereas, the accent is expressed in the performance of it. The rythm is addressed to the eye, the accent to the ear. The figure "2" following the clef indicates what is known as *double* measure, the figure "3" *triple* measure, the figure "4" *quadruple* measure and so on. Double measure may be represented by *two half notes* or by *two quarter notes*, hence arises the necessity for a sign by which to indicate the *value* of the count or note. From the fact that all the degrees of the staff are employed inclusively from one to eight in representing the major scale, and that the so-called intermediate tones must from necessity be noted on the degrees with the other tones, there arises a demand for characters or signs by which to indicate a difference of pitch between two notes written on one and the same degree of the staff—these signs are called *sharps* and *flats*. A sharp, thus (\sharp) before a note elevates the pitch of that note to the next tone of the chromatic scale, and a flat (\flat) before a note depresses the pitch thereof to the next tone of the chromatic scale. A *natural* is a sign thus (\natural) used to cancel the effect of either a sharp or a flat. The agreement between the letters on the degrees of the staff and the tones of the scale represented thereon is effected by means of the *sharps* and *flats*. There are also used characters to indicate force, such as *piano* for soft, *forte* for loud, &c., together with a large variety of signs for indicating the expression. Such are some of the laws which govern the construction of a musical composition, and to which all musical compositions must and do conform. In the composition entitled "Cradle's Empty, Baby's Gone," the author employs the staves which are joined by a brace, next he uses the G clef to locate the pitch of the letters on the upper staff and the F or bass clef to designate the bass clef. Immediately after the clef there is the letter "C" showing the time and number of parts in a measure. Above the upper staff appear the words, "*Moderato Con Express*,"

indicating the movement of the piece, while between the two staves there are the letters "*mf*" to indicate the power. There are also other marks of expression such as *crescendos*, *diminuendos*, slurs, ties &c. In addition to the forgoing there appear bars, double bars, rests, sharps, naturals, &c. In this composition all the foregoing (including the notes) are essential to a proper interpretation of the piece and the absence of any one of them would make the piece unintelligible. In the perforated paper used on the musical instrument none of these characters or signs are used. There is no clef to locate the pitch, no sharps or flats to indicate the key, no bars or measures to show its rythmical structure, no figures or letters to designate the kind of measure, or the accent, nothing to show expression, nor in fact any of the many signs or characters that become absolutely necessary to even convey an impression or conception of the author of the musical composition. It becomes true as is stated in the complainants' amended bill that it "is adapted and intended for a use wholly different from any use possible to be made of the printed music." The length of the perforation is no indication of the length of the note, as the length of the perforation to produce a given length of note must vary with the feeding mechanism of each style of instrument, and there is no standard which can be used as a guide. The defendant denies that "any person skilled in the manufacture of sheet music and also skilled in the manufacture of the perforated sheets or strips can produce either from the other," or that "a person skilled in the use of the ordinary sheet music can readily learn to use the perforated sheets or strips without the aid of the special musical instrument for which they are designed," or that "any person familiar with both can translate the one into the other or could use the perforated paper as he would the printed music."

7th. The defendant can neither admit nor deny that the perforated sheets or strips of paper have been largely used during the past seven or eight years, but avers on his information and belief that the sales of the perforated paper similar to Complainants' Exhibit B, has been very limited.

8th. The defendant can neither admit nor deny "that the Automatic Music Paper Company, has been and is largely engaged in the manufacture and sale of the perforated sheets or strips of paper, that that is their sole business, and that all such perforated sheets or strips sold by them has been copied from the printed sheet music with

such alterations as are necessary to suit the compass of the instrument with which it is to be used, and that in the course of their business the said Automatic Music Paper Company, have obtained many exclusive licenses from the proprietors of copyrighted musical compositions to copy their copyrighted musical compositions in perforated sheets or strips, and to vend such copies, and that in consideration of a certain royalty paid by said company to said Kennedy, said company on or about the first day of June, A. D. 1882, received from said Kennedy the exclusive license to copy the musical composition copyrighted by said Kennedy, as above mentioned into the perforated sheets or strips and to vend such copies." And the defendant avers that if said Kennedy ever gave any such license as is alleged in complainants' bill, the same was and is of no force or effect and conferred no right, exclusive or otherwise, as against the defendant or any other party. And the defendant can neither admit or deny that "the said Automatic Music Paper Company gave due notice on each and every copy of said musical composition sold by them, by printing upon each and every copy the words:— "Cradle's Empty, Baby's Gone. Copyrighted, 1880, by Will. H. Kennedy. Used by permission of Will. H. Kennedy."

9th. The defendant denies that "well knowing the premises and that the said Kennedy was the author of said musical composition, score and music, and the proprietor of said (alleged) copyright, and that the said Automatic Music Paper Company was the sole and exclusive licensee of the right to copy and vend said musical composition in the shape of perforated sheets or strips as shown in Complainant's Exhibit "B," and well knowing that both said Complainants are largely interested in the sale of said perforated copies of said musical composition and score, and wrongfully intending to infringe and pirate said copyright and said copyrighted musical composition and score of which said Kennedy is author and proprietor, and said company his exclusive licensee as aforesaid," he "did deliberately and after due notice on or about the eighteenth day of May, 1883, and at divers other times both before and since said eighteenth day of May, A. D. 1883, without the allowance or consent of either of said complainants, and in open violation of their rights, copy, make and vend said musical composition by making and vending exact copies of the

perforated strips or sheets made and vended by said company." And the defendant denies that the complainants, or either of them have any exclusive right to manufacture and sell said perforated sheets or strips like Complainants' Exhibit "B," and denies that said alleged copyright on the printed musical composition, entitled "Cradle's Empty, Baby's Gone," extends to or could by any means be extended to and embrace the said perforated strips or sheets as shown in Complainants' Exhibit "B," or that said perforated sheets or strips are any infringement or piracy of the Complainants' Kennedy's Copyright, if any he has, in said musical composition, entitled "Cradle's Empty, Baby's Gone." And the defendant further says that he is not now and has not been engaged in the manufacture of said perforated sheets or strips since June, A. D. 1882, and that he does not now and never has made or sold any of said perforated sheets or strips like Complainants' Exhibit "B," and denies that he has made any profit thereby.

To the several interrogatories propounded by the complainants, the defendant replies:

1st. To the first interrogatory, the defendant says he has no means of knowing, except as stated in complainants' bill, "whether or not it is a fact that the said Kennedy is the author, composer and writer of the words and music of the book, musical composition and song, entitled "Cradle's Empty, Baby's Gone."

2d. To the second interrogatory, the defendant says he has no knowledge except from the allegations in said bill contained, "whether or not it is a fact that said Kennedy did before the publication thereof and on the 23d day of August, 1880, deliver at the office of the Librarian of Congress, at Washington, in the District of Columbia, a printed copy of the title or description of said song, musical composition and book in these words: "Cradle's Empty, Baby's Gone. Song and Chorus. Words and Music by Harry Kennedy."

3d. To the third interrogatory, the defendant says he has no knowledge, except the allegations contained in said bill, "whether or not it is a fact that said Kennedy did thereafter and on the 23d day of August, 1880, and within ten (10) days from the publication thereof deliver at the office of the Librarian of Congress, at Washington, in the District of Columbia, two complete printed copies of such

copyrighted book, song and musical composition, of the best edition issued, as the statute requires."

4th. To the fourth interrogatory, the defendant says he has no knowledge save as alleged in said bill, "whether or not it is a fact that thereupon and on said 23d day of August, 1880, the said Librarian of Congress, at Washington, in the District of Columbia, did forthwith record the name, description and title of said song, musical composition, words and music in a book kept for that purpose, in conformity with the laws of the United States respecting copyrights."

5th. To the fifth interrogatory, the defendant says he has no knowledge save as alleged in said bill, "whether or not it is a fact that thereupon and on said 23d day of August, 1880, and thereafter notice was given by said Kennedy of said copyright by inserting in each and every of the copies of every edition thereof published, on the title page and on the page immediately following the title the words: 'Copyright, 1880, by William H. Kennedy.'"

6th. To the sixth interrogatory, the defendant says he has no knowledge except from the allegations in said bill contained, "whether or not it is a fact that the Automatic Music Paper Company has since the said first day of June, 1882, and always since receiving from said Kennedy the (alleged) said license to copy and vend said musical composition in the shape of perforated sheets or strips, given due notice of said copyright by printing upon each and every of said copies, the words: 'Copyright, 1880, by Will. H. Kennedy. Used by permission of Will. H. Kennedy.'"

7th. To the seventh interrogatory, the defendant says upon his information and belief, that there is no market whatever for perforated sheets or strips of paper so perforated that they are substantially copies of and correspond to the score of such musical compositions as are desired to be performed, for the reason that none are so made, and that it would be impossible to perforate paper so that it would be substantially copies of and correspond to such score."

Wherefore the defendant prays that he be hence discharged and with his costs.

C. T. & T. H. RUSSELL,
Solicitors and of Counsel.

J. McTAMMANY.

SUFFOLK, SS.

BOSTON, May 2d, 1885.

Personally appeared the above-named John McTammany and made oath that he has read the foregoing answer to said bill of complaint and knows the contents thereof; and that the same is true, except as to those matters therein stated on information and belief, and as to those he believes it to be true.

Before me,

[SEAL]

WM. E. RUSSELL,

Notary Public.

This cause was thence continued to the May Term, A. D. 1885, when the following Replication was filed:

REPLICATION.

(Filed May 28, 1885.)

These repliants, saving and reserving unto themselves all and all manner of advantage of exception to the manifold insufficiencies of said answer, for replication thereunto say, that they will aver and prove their said bill to be true, certain and sufficient in the law, to be answered unto, and that the said answer of the defendant is untrue and insufficient to be replied unto by these repliants; without this, that any other matter or thing in the answer contained, material or effectual in the law to be answered unto, confessed and avoided, traversed or denied is true, all which matters and things these repliants are and will be ready to aver, maintain and prove as this Honorable Court shall direct, and humbly pray as in by their bill of complaint they have already prayed.

By their Solicitor,

J. E. MAYNADIER.

This cause was thence continued from term to term to this present term, when the following Stipulation is filed:

STIPULATION AS TO TESTIMONY OF
WILLIAM H. KENNEDY.

(Filed October 31, 1887.)

It is hereby agreed that the said William H. Kennedy, if called as a witness for complainants, would testify that he is a citizen of the United States and a resident therein and has been a citizen of and a resident in the United States since August 23, A. D. 1880, and for many years before that; that he is and has for many years been known in musical and dramatic circles as Harry Kennedy; that he is the author and composer of the words and music of a certain musical composition entitled "Cradle's Empty, Baby's Gone"; that on the 23rd day of August, A. D. 1880, and before the publication thereof, he delivered at the office of the Librarian of Congress at Washington, District of Columbia, a copy of the title of said musical composition in the following words, to wit:

"Cradle's Empty Baby's Gone.

Song and Chorus.

Words and music by

Harry Kennedy."

that on the 23d day of August, and within ten days from the publication thereof, he did deliver at the office of the Librarian of Congress at Washington, two copies of said musical composition; that he gave notice of said copyright by inserting upon some visible portion of each and every copy thereof published, the words:-

"Copyright 1880, by Wm. H. Kennedy."

Final Decree and Appeal. 35

that on or about the first day of June, A. D. 1882, he executed the exclusive license to the Automatic Music Paper Company referred to in the bill of complaint, and it is agreed that the above may be taken and used with the same force and effect as if the said Kennedy were called as a witness and testified to the same.

It is also agreed for the purposes of this trial that the defendant, on or about the 18th day of May, A. D. 1883, and at divers times before and since that day, made and sold paper strips of which the one herewith produced is a sample. The strip produced has upon it a stamp with the following words in an ellipse: "J. McTammany, Jr., Inventor & Manuf'r of Organettes, Orguinettes, Melopeans, Automatic Organs & Music, Worcester, Mass."; and above the stamp the words "Cradle's Empty, Baby's Gone".

J. E. MAYNADIER,
Solicitor for Complainants.
C. T. & T. H. RUSSELL,
Solicitor for Defendant.

This cause thereupon came on to be heard upon the pleadings and proofs and was argued by counsel for the respective parties, and now upon consideration thereof, to wit, January 27, A. D. 1888, It is ordered, adjudged and decreed by the Court that the Bill of Complaint in this cause be and the same is hereby dismissed with costs for the defendant taxed at

From this decree the complainants claim an appeal to the Supreme Court of the United States and give good and sufficient security that they will prosecute their appeal to effect and answer all damages and costs if they fail to make their plea good, and said appeal is allowed.

A true Record:

Attest:

John G. Stetson
Clerk.

36 Evidence for Complainants

The following is the Evidence used at the hearing of said cause before said Circuit Court:

EVIDENCE FOR COMPLAINANTS.

Taken pursuant to the sixty seventh rule of the Supreme Court of the United States, in Equity, as amended,

Before me,

WILLIAM A. COPELAND,
Special Examiner.

Boston, December 14, 1885.

Present: J. E. MAYNADIER, Esq., of Counsel
for Complainants;
CHAS. THEO. RUSSELL, Esq., of Counsel
for Defendant.

DEPOSITION OF WILLIAM A. WEBBER.

Int. 1. What is your name, age, residence and occupation ?

Ans. William A. Webber; 45; Medford, Mass.; arranger of music.

Int. 2. Please look at the piece of music now shown you, and state whether you are familiar with it; when you first knew it, and what you have had occasion to do about it, explaining when, where and how ?

[*The piece of music including the title page, one blank page and one page of advertisements, consists of six pages, and is now put in evidence and marked Complainants' Exhibit Common Sheet, W. A. C. Spl. Ex'r.*]

Ans. I am familiar with it. I can't tell exactly, but I think in the fall or winter of 1881. My attention was called to it by some one in the mechanical music line as being a good piece to put on for orguINETTE music. I bought the piece of Ditson. I prepared it for fourteen note orguINETTE music by placing the copy in front of me; then on my bench I have a long strip of what we call stencil paper, which has fourteen lines running lengthwise of the paper that correspond with the fourteen note orguINETTE scale. Perhaps I should have said, I first played it over on an organ to see if it could easily be arranged for a fourteen note orguINETTE; then prepared my stencil paper, by making bars across it corresponding to the bars in the music; then by means of a scale marked with syllables corresponding with the fourteen note orguINETTE, I copied, first, the melody of the song, "Cradle's Empty, Baby's Gone," and afterwards marked in as much of the accompaniment as was possible for the instrument. I then gave the stencil to a workman, who cut out the marks that I had made, which corresponded with the notes in the music. The stencil was then put on a machine and two or three copies perforated, one of which was brought to me, which I played on the orguINETTE and compared with the music as printed. The stencil was then marked all right, and a large number of copies cut from it, finished up ready for sale.

Int. 3. Have you ever arranged that piece of music [*Exhibit Common Sheet*] for any other instrument? If so, please explain how and for what instrument or instruments?

Ans. I have arranged it for an instrument called the Musical Cabinet—thirty-nine note. The process for arranging it is about the same as for the orguINETTE, only on a larger scale. I don't recall other ones that it has been arranged for. It may have been copied though for other instruments.

Int. 4. What difficulty, if any, have you in reading this perforated sheet music such as that now shown you, [*now put in evidence and marked Complnts.' Exhibit Strip Sheet, W. A. C., Spl., Ex'r.*]

[*Objected to as asking for incompetent and irrelevant evidence.*]

Ans. I have no difficulty in reading it. I can read it.

Int. 5. State generally as to musicians' skill in reading common sheet music—that it, what difficulty, if any, have they in reading strip sheet music, and give such instances as you may recollect.

[*Objected to as asking for incompetent and irrelevant evidence.*]

Ans. That is a vague question. Will you read the question again. [*Magistrate reads the question.*] We have four or five working for us that can read this as easy as they can ordinary sheet music. I have had three or four good musicians come into my room, and after a very short time, could read the air of this strip music quite as readily as off of printed music. The musician would judge from the length of the perforation as to the length of the note. There are many singers that read just from the position of the notes on the staff. Such singers could read this quite as readily as off of ordinary printed music.

Int. 6. Which of the musical signs or marks in Exhibit Common Sheet are not in Exhibit Strip Sheet?

Ans. The brace bracing the two staves together, the clef, the time mark and the expression marks and the bars, and a pause-hold, rests, staccato marks. That's all I guess.

Int. 7. You spoke, in one of your answers, as to arranging Exhibit Common Sheet for the Musical Cabinet. Please state what notes, if any, were lacking in the perforated or strip sheet music for that instrument which are in Exhibit Common Sheet.

[*Objected as irrelevant and incompetent.*]

Ans. That was a perfect copy of the music, as that is a chromatic scale and every note could be put in as written.

Int. 8. What notes found in Exhibit Common Sheet are lacking in Exhibit Strip Sheet?

Ans. There are four notes in the melody of the strip that are not written as in the Common Sheet. The accompaniment is necessarily changed on account of the small compass of the fourteen note instrument, the harmony remaining nearly the same.

Int. 9. Did you change the four notes of the melody to which you have referred? If so, why?

Ans. I did; the notes not being in the instrument I selected the next best notes to take their place.

Int. 10. Please explain what "arranging" is, and especially how your work as arranger differs from that of others who arrange music—say a bandmaster or the like.

[*Objected to as immaterial and irrelevant.*]

Ans. Arranging music is a general term for taking music and arranging it for different instruments from that for which it was composed. A bandmaster divides the composition up, giving part of the composition to one instrument, another part to another, and so on until the whole composition can be rendered complete. My work of arranging is to copy the music as completely as possible for the instrument that it is intended for, that I am arranging for—and one organ that I arrange for having forty-six notes, a chromatic scale, I am able to arrange complete overtures.

Int. 11. Please explain the duty of an arranger who, for example, should arrange Exhibit Common Sheet for a guitar or some other instrument different from that which Exhibit Common Sheet is arranged for?

[*Objected to as irrelevant and incompetent.*]

Ans. I never arranged any music for a guitar. My opinion is that it would be to copy the notes and bring them within the compass of the instrument.

Int. 12. What knowledge common to skilled musicians adapts a man to perform your duties as arranger for the orguINETTE and like instruments?

[*Objected to.*]

Ans. He must be a ready reader of printed music. He must also be familiar with the different clefs used in orchestral scores.

Int. 13. What do you do with the stencil when, in correcting the proof, you find an imperfect or incorrect note?

[*Objected to.*]

Ans. After having found the incorrect note by means of the gauge, I glue a piece of cloth-lined paper over the perforation, cutting a note in the right place. It is then put on the machine and a new proof sent to me to be tried.

Int. 14. And in how many cases on the average do you require a second proof?

[*Objected to.*]

Ans. In nearly every case.

Int. 15. And in how many more than two proofs, if any?

[*Objected to.*]

Ans. I should judge about one in every eight would require another proof.

Int. 16. How many different varieties of this strip sheet music are you familiar with?

Ans. About twenty.

Int. 17. And how many of them can you read at sight?

Ans. Nearly all of them. By reading at sight I don't mean to convey the idea that I can read both melody and harmony as readily as from sheet music.

Int. 18. As to arranging from the strip sheet to the printed sheet instead of vice versa, please state whether you can take a piece of strip sheet music and arrange it for the piano; and if so, assume that you are wholly unfamiliar with the composition and see nothing but the strip sheet, and state how your arrangement for the piano will compare with the original arrangement from which the strip sheet was copied or arranged.

[*Objected to.*]

Ans. I can arrange from strip sheet and have done so. If I know for what instrument the strip sheet is arranged, I can make nearly an exact copy of the music.

Int. 19. Your last answer is not quite clear, I think. You say you can make nearly an exact copy of the music. Please explain what you mean by "copy of the music."

Ans. I mean that if my copy was played on the piano it would sound like the music as played on the instrument.

Int. 20. And how would your copy of manuscript or common sheet music, made from perforated or strip sheet music, compare with the printed or common sheet music from which the strip sheet was copied?

[*Objected to.*]

Ans. If the strip sheet music was arranged for a large instrument having a complete chromatic scale, my copy would be nearly a fac simile of the original printed sheet. If the strip sheet was arranged for a smaller instrument having a compromised scale, the melody

would be nearly correct, but the accompaniment would not be very full.

Int. 21. Have you ever composed music? If so, what is your habit as to the way of writing it? that is, whether in common sheet form or strip sheet form.

[*All objected to after the word music.*]

Ans. I have composed music. When for ordinary publication, as ordinary sheet music, I write up my ideas on music paper prepared for the purpose; send to the printer, he sending me proofs as he prints the different sheets. After they are all corrected, he sends me a complete copy of the same. I have composed quite a number for strip music also. These I arranged on our stencil paper. I did not use the ordinary sheets. There is one piece that I composed, called Home Waltz, that I first composed for the strip music sheets and arranged on stencil sheets. Having had several calls for it, I copied it and have published it in the common sheet form.

Int. 22. When you compose especially for the orguINETTE and the like instruments, in what form is the manuscript?

Ans. I don't understand the question?

Int. 23. Have you a stencil ready for the operator who makes the perforations? If not, please produce one after the adjournment.

Ans. There is one ready at the factory and I will produce it.

[*Noon recess.*]

Int. 24. Please produce the stencil spoken of just before the adjournment, and explain it, and state how it differs, if at all, from a musical composition composed by you and first written upon paper of that kind, that is, a long strip marked as the stencil was before you went to work upon it.

Ans. This is the stencil referred to—and the characters on it and the marks are just the same as they would be in a composition which I should compose on this paper. In this case it is an air from an opera that I have copied from the opera.

[*Now put in evidence and marked Complainants' Exhibit Stencil, W. A. C., Spl. Ex'r.*]

Int. 25. When you made Exhibit Stencil did you have any music of any kind before you? or did you write from recollection of the airs of the opera?

[*Objected to.*]

Ans. I wrote from recollection. I knew the air so well that I didn't need the music before me.

Int. 26. How many musical compositions do you know of which were first brought out in the form of strip sheet music?

[*Objected to.*]

Ans. I have certain knowledge of seven, for I composed them myself.

Int. 27. What has been your experience generally as to music and musical matters?

Ans. In regard to what? composing? [*Counsel says, "as to everything."*] Personal experience? I commenced studying music when I was quite young, and could read music readily when I was nine years old; have taken piano lessons of Lang, and organ lessons of Thayer; played an organ in church for about eighteen years; composed many responses and psalm tunes and church music of various kinds; given lessons on the organ, voice and piano.

Int. 28. What occupation, if any, have you ever followed except relating to music and music and musical instruments?

Ans. I first learned the sash and blind makers trade; found it neither congenial nor remunerative, and then learned tuning organs and pianos; left that occupation to arrange music for automatic musical instruments.

Int. 29. How long have you been connected with the complainant company and how?

Ans. I think I first arranged music for them in 1879. I arranged music for automatic instruments in 1879. I am engaged by the company as musical director; that is my title and I am one of the directors of the company, and I am responsible for the correctness of all the music that is issued; am also stockholder.

[*Complainants now put in evidence a certified copy from the Library of Congress, marked Complainants' Exhibit Copyright Certificate, W. A. C., Spl. Ex'r.; also an original paper purporting to be an agreement between the two complainants, and the certificate of the recording thereof marked Complainants' Exhibit License, W. A. C., Spl. Ex'r.*]

[*The Defendant objects to the use of either of said papers as not having been duly proved in the case.*]

Int. 30. Please look at the paper now shown you, marked Exhibit License, and state if you know the signatures. If so, whose are they?

Ans. I do. I know all three signatures. I saw them written. Will. H. Kennedy, W. A. Webber (which is myself), witness, Joseph Kennedy.

[*Defendant objects to this as incompetent evidence to prove the signatures.*]

Cross Examination by CHARLES THEODORE RUSSELL, Esq., *of Counsel for Defendant.*

[*Defendant puts all cross questions in regard to any matter covered by questions objected to in the examination in chief, de bene esse.*]

Cross-Int. 31. Have you attended all the hearings that have been had in court upon this case?

Ans. I have not.

Cross-Int. 32. Have you furnished any of the information upon which the original or amended bill were drawn?

Ans. I have.

Cross-Int. 33. Did you furnish the statements upon which the original bill was drawn by Mr. Russ?

Ans. I might have furnished some of the statements. I don't remember what ones.

Cross-Int. 34. Who is the president of the Automatic Co.?

Ans. Mr. George B. Kelley.

Cross-Int. 35. Do you have charge of the company so far as selecting and arranging all the music is concerned?

Ans. All the music is always submitted to me for my decision in regard to it.

Cross-Int. 36. Are not the sole and exclusive use and purpose of the perforated papers which you call strip sheet music as a mechanical means or agent to put a tune through the orguINETTE or musical instrument for which they are made and adapted?

Ans. That is the only use that I know that they are put to at present.

Cross-Int. 37. Can they be used for any other use or purpose in competition with the ordinary sheet music?

Ans. As at present arranged, I should say not.

Cross-Int. 38. Can they be read or used in place of the printed sheet music by the ordinary player or musician?

Ans. They could with some instruction.

Cross-Int. 39. What kind of instruction?

Ans. The person to be given the first note of the melody and be told the scale of the instrument, and I think an ordinary musician could read the melody and the music.

Cross-Int. 40. Scale of what instrument?

Ans. The instrument that the strip sheet was written for.

Cross-Int. 41. Have you ever known any of these strip sheets to be purchased and used in place of the original sheet music by the ordinary purchasers and players of sheet music? and if so, when and where and by whom?

Ans. I have not.

Cross-Int. 42. When a bandmaster distributes his music to the various parts, he takes and uses the original sheet music in its original sheet form thus separated, doesn't he?

Ans. I have never arranged any band music, and I know very little about that.

Cross-Int. 43. But you have, in this deposition, compared the arrangement of music by yourself in strip sheets, with that of the bandmaster, have you not?

Ans. The comparison was made in the question, and I answered the question to the best of my ability, that the bandmaster gave some airs to one instrument and some to another, while I made as complete a copy as I could for one instrument.

Cross-Int. 44. But in doing this, the bandmaster uses the original sheet music and gives it out, does he not?

Ans. I supposed that you were speaking about arranging the original score into a band piece—and not the giving out the parts to the musicians to play after they had been arranged.

Cross-Int. 45. In arranging the original score into a band piece, does not he use exact copies of the original sheet music and give them out to the several parts?

Ans. In my opinion he does.

Cross-Int. 46. Now in arranging sheet music for the automatic instrument, you first cut out the notes, etc., in stencil, and from the

stencil into perforated paper, and then you use the perforated paper as a mechanical agency or means and as a part of the instrument to produce the notes by reeds in the instrument, do you not?

Ans. I certainly arrange the sheet music on a stencil sheet, and to me it is music, and I then have it perforated on a machine which makes duplicates. I play it on the instrument that it is intended to be played on. If the music is correct, then my work on that music is done.

Cross-Int. 47. How and when does it come into the perforated papers you call strip sheets?

Ans. When the perforating machine makes an exact duplicate of my stencil.

Cross-Int. 48. And when that exact duplicate is made, what is its sole use and purpose?

Ans. It is to be played on the instrument that it was arranged for.

Cross-Int. 49. It is a piece of machinery to enable the instrument automatically to play the tune, isn't it?

Ans. I should hardly call it a piece of machinery. It seems to be music, as I can read it readily.

Cross-Int. 50. What does it do in the instrument? Is it put into the instrument to be read or to play the tune automatically.

Ans. It is certainly put in to play the tune.

Cross-Int. 51. And it isn't put in for any other purpose whatever than to play the music automatically in the instrument, is it?

Ans. In the case of small instruments, it is not. On larger and more perfect instruments, the key and expression of the music is printed on the perforated sheets to enable the performer to play the music as written.

Cross-Int. 52. Printed how?

Ans. With a rubber stamp on the surface of the paper.

Cross-Int. 53. You mean that it is put on in print then, do you not?

Ans. I do.

Cross-Int. 54. Then so far as the perforated papers are concerned, without any print they are used for the sole purpose of enabling the instrument to play the tune automatically, are they not?

Ans. Probably that is so; I think that is so.

Cross-Int. 55. After you have got the first paper from the stencil,

why, before cutting the perforated papers from it, do you play it through the instrument?

Ans. It is a way of testing it to see that the notes are all right, a much quicker way than of going over it with my scale.

Cross-Int. 56. And that is the mode that you always employ to test it, is it not?

Ans. It is—nearly always.

Cross-Int. 57. If the president of the company, Mr. Kelley, had made this statement in this case, "that by recent ingenious inventions and discoveries in musical instruments and appliances for the performance of musical compositions on such instruments, a musical composition may be performed upon certain musical instruments, called or known as orguinettes, organettes and organinas, by means of long sheets or strips of perforated paper, which said sheets or strips of paper are constructed with perforations, through which the passage of air coming in contact with reeds or other sounding devices, produces a performance of a musical composition"; would it or not correctly and truly describe the operation and purpose of these perforated papers?

Ans. I should say it would.

Cross-Int. 58. And if it was further stated in substance, that such purpose was entirely different from the original purpose of sheet music, would or not that be correct?

Ans. I should think it would.

Cross-Int. 59. In your answer to interrogatory 9, what instrument do you refer to?

Ans. To the fourteen note orguINETTE.

Cross-Int. 60. What do you mean by the "machine" in your answer to int. 13?

Ans. I mean the perforating machines that cut the music from the stencil.

Cross-Int. 61. Have you in your answer to int. 6, stated all the difference between the sheet music and the strip music?

Ans. I thought I did at the time. I didn't think of anything else.

Cross-Int. 62. Does not the sheet music contain a staff consisting of lines and spaces? And also accidental flats and sharps and double bars which are not in the perforated sheets?

Ans. It does.

Cross-Int. 63. How many of the strip sheets referred to in your answer to int. 16, were arranged by you or under your direction?

Ans. I can count twenty that I have had the personal supervision of arranging.

Cross-Int. 64. How often have you translated from strip sheet to sheet music as you state in your answer to the 18th interrogatory?

Ans. I have six pieces that I remember of now.

Cross-Int. 65. Suppose you know nothing, not even a note, of the music included in the perforated sheet, nor of its purpose or design, can you then read or translate it into sheet music?

Ans. I don't think I could without some clue to start with, but if it was really a piece of music, a little instruction would enable me to do so.

Cross-Int. 66. Have you ever got or attempted to get any copyright upon any perforated paper sheets?

Ans. I never have myself, but I think a member of our firm has.

Cross-Int. 67. Do you mean that he got a copyright or that he attempted to get one?

Ans. He applied for it.

Cross-Int. 68. Did he get any copyright?

Ans. I believe not.

Cross-Int. 69. Why did you publish the Home Waltz, referred to in your answer to the 21st interrogatory, as sheet music instead of in perforated paper?

Ans. Because I had calls for it in that form.

Cross-Int. 70. Could the calls you had for it in that form have been at all met by its issue as a perforated paper?

Ans. I presume not, as the same parties that sold the perforated music, bought it in sheet form also.

[Adjourned.]

BOSTON, Dec. 28, 1885.

[Present: Counsel as before.]

Cross-Int. 71. Wherein does the perforated sheet to which you have testified, differ in function or purpose from the barrel of the hand organ?

Ans. I should say there was not much difference in the function or purpose from the barrel of the hand organ.

Cross-Int. 72. Will you look at the patent shown you of Joseph Metzger, [now put in evidence and marked Defendant's Exhibit Metzger Patent,] and tell me wherein the perforated sheets you have testified to differs in purpose, function or use from the perforated sheet set forth in that patent?

Ans. The only difference that I can see is that the perforations in this sheet wound around the barrel open the valves in a different manner from the strip sheet to which I have testified before.

Cross-Int. 73. The strip sheet in that patent wound around the barrel performs the same functions, and has the same use and purpose as the barrel in the hand-organ, does it not?

Ans. I should say it did.

Cross-Int. 74. And the only difference between that perforated sheet on the roller and the perforated sheets you testify to is, that one is wound around the roller and the other is carried over the reeds by a series of rollers, isn't it?

Ans. Yes sir; that is the only difference I know of.

Cross-Int. 75. Did you copy the melody correctly or did you omit some notes and substitute others, and how much of the accompaniment did you put in, and did you change the key in doing what you say you did in your answer to question 2?

Ans. I did not copy the melody exactly as in the score. I was obliged to omit some notes as they are not in the orguINETTE. I substituted other notes in place of the correct ones. I followed the accompaniment of the printed sheet as completely as the limited scale of the orguINETTE would allow. I changed the key; as the orguINETTE will admit of playing in only two keys.

Cross-Int. 76. Then it does not copy either in the melody, the harmony or the key the printed sheet, does it?

Ans. It does not literally, but enough to be recognized by any musician.

Cross-Int. 77. If the notes, as in the printed sheet music, are put on paper, but without lines, spaces or other signs, could anybody read them?

Ans. I can—a simple air.

Cross-Int. 78. Do the notes on the strip correspond with those on the printed sheet as to duration; and what marks their duration?

Ans. To one familiar with both kinds of music they do correspond. The length of the perforation denoting the length of the note.

Cross-Int. 79. Is not this from your prior knowledge more than from any indication in the printed sheet?

Ans. Well, yes, it is.

Cross-Int. 80. Are the key, the time, what kind and how many notes to the measure, major or minor, indicated on the perforated sheet?

Ans. They are not.

Cross-Int. 81. Do you mean to say that a knowledge of the perforated strip would enable one to understand clefs, sharps, flats, time, expression and all the other signs?

Ans. I do not.

Cross-Int. 82. Will you please state what you mean by a compromise scale?

Ans. A scale of reeds with some of the notes left out, making the distance from the lower note to the upper greater, usually comprising the notes used in simple melodies.

Cross-Int. 83. Isn't the scale of the McTammany orguINETTE so much of a compromise as to make it impossible to perform the piece as copyrighted; and is it not necessary to have it transposed and re-arranged before it can be performed on the McTammany instrument?

Ans. Do you mean the fourteen note orguINETTE? [*Counsel says, "well assuming that."*] It would be impossible to perform the piece literally as printed on the sheet without re-arranging.

Cross-Int. 84. Now in what you say you did in answer to question 2, why did you compare the perforated sheet with the printed music after playing it on the orguINETTE, and why did you mark it all right?

Ans. I played it to see if I could put in more notes to make the harmony fuller, and be sure that I had made no mistakes in harmony or melody, I marked it all right because I believed that was as near as I could play the air on a fourteen note orguINETTE.

Cross-Int. 85. Do you mean to say that when you write music for printing you make the same signs and characters that appear in the stencil?

Ans. I do not, with the exception of the bars, the notes being of a different shape.

Cross-Int. 86. Are there not 29 staves, 145 lines, 174 spaces, 28 measures, 8 braces, 23 bars, 3 double bars, 6 different notes, 131 dots which add one-third to the value of the notes, 29 clefs, 2 kinds of clefs, G and F, 1 sign of time, 5 slurs, 9 ties, 18 characters representing expression, 25 rests, 2 kinds of rests, 21 accidental sharps, 7 naturals, 2 verses containing 80 words, and 1 chorus of 28 words, all of which are in the printed music sheet, "Cradle's Empty, Baby's Gone," which are not in the perforated paper that you say is cut from it?

Ans. All these characters are in the printed sheet, and nothing but perforations representing some of the notes are in the perforated sheet.

Cross-Int. 87. Are not the notes in the perforated sheet represented by different characters and cut for a different purpose from what they are used in the printed sheet?

Ans. They are in this exhibit.

Cross-Int. 88. Are not all the elements named in question 86 important and essential elements in the printed sheet of music?

Ans. They are not all essential. They are of more or less importance.

Cross-Int. 89. Will you now hear read your answer to the 4th interrogatory — [*answer read.*] Will you look at the perforated sheet now shown you, [*now put in evidence and marked Defendant's Exhibit Perforated Sheet A,*] and tell me what the music is?

Ans. I don't know that I know the piece.

Cross-Int. 90. And you cannot read it so as to tell what it is, can you?

Ans. I will ^{sing} ~~sign~~ all the syllables of the piece.

Cross-Int. 91. But you cannot tell me what tune it is?

Ans. I cannot tell you the name of the tune.

Cross-Int. 92. Please look at Defendant's Exhibit Perforated Sheet B, and tell me what tune it is?

[*The same is now put in evidence.*]

Ans. It is Old Hundred. This is the first end [*pointing to a certain part marked First end, W. A. C.,*] and this the air.

Cross-Int. 93. Now please look at Defendant's Exhibit Perforated Sheet C, and tell me what tune it is?

[*The exhibit is now put in evidence.*]

Ans. I have forgotten the name of the tune—I can whistle the tune for you. I will sing the air and if some of the gentlemen present recognize it—[*witness hums the tune.*] I remember it now—Seymour is the name of the tune.

Cross-Int. 94. You say in your answer to interrogatories in chief that you are familiar with twenty varieties of strip music, and that you can read at sight nearly all of them. Why can you not read all of them.

Ans. On account of the notes of the instrument for which the music is written, not coming in regular succession as in organs and pianos.

Cross-Int. 95. Then your reading depends, does it not, upon your knowledge of the scale of the instrument?

Ans. Partly, but not entirely. I read by the relative position of the notes as they follow each other.

Cross-Int. 96. But that is not the way you read ordinary sheet music, is it?

Ans. In ordinary simple sheet music, I read a whole measure at a time, and do read by relative position a great deal.

Cross-Int. 97. In the ordinary sheet music the position of the note indicates the pitch, doesn't it?

Ans. It does.

Cross-Int. 98. How is it indicated in the perforated sheet?

Ans. By the notes being higher and lower than each other.

Cross-Int. 99. How would you tell by the position of the notes the major from the minor key on the perforated sheet?

Ans. It would be rather difficult to tell.

Cross-Int. 100. Taking the uses and the purposes of the perforated sheet, and the differences between it and the printed music sheet, do you think any one would think of using the perforated paper in the place of the ordinary use of the printed music sheet?

Ans. I should say not, if they could afford a piano or an organ to use the printed sheet on.

Cross-Int. 101. What you mean then, is that they would use the perforated sheet only as a part of an instrument which plays a tune by mechanism, is it not?

Ans. Yes, sir.

Cross-Int. 102. The ordinary printed music sheet only conveys to the mind an idea of what the hand or voice must do, does it not?

Ans. Yes, sir.

Cross-Int. 103. The perforated paper, on the contrary conveys no idea, but performs the act, does it not? and is so intended?

Ans. It is intended for performing the act, and would convey no idea except to a musician.

Cross-Int. 104. Now in cutting this tune of Cradle's Empty, into perforated paper is it not carried up so high that the voice cannot sing it?

Ans. It is not.

Cross-Int. 105. What change do you make in cutting it from its arrangement for the voice in the printed sheet?

Ans. I arranged it in the key of D, instead of in the key of C, as it is in the original.

Cross-Int. 106. Would that affect the singing of it at all; and if so, how?

Ans. It would make the melody a little higher, but most tenor singers could sing the whole melody.

Re-direct examination by MR. MAYNADIER, for Complainants.

Int. 107. Please sing or whistle from Defendants' Exhibit, Perforated Sheet A.

Ans. [*Witness whistles.*] I don't make much tune of that.

Int. 108. Can you now remember the name of the tune?

Ans. I do not.

Int. 109. Is there anything peculiar about the Exhibit Perforated Sheet A.

Ans. The notes seem to be cut irregularly, not beginning together, and there's no very marked melody that I can discover.

Int. 110. Are you able to say with confidence whether Exhibit Perforated Sheet A is a piece of music, properly so-called or not?

Ans. I am not.

Int. 111. Can you say with confidence whether Exhibit Perforated Sheet A, is a piece of familiar music or not?

Ans. I should say it was something I knew nothing about and had never heard, I recognize no air in it.

Int. 112. Something has been said in cross-examination as to perforated strip music appealing to the mind through the eye. Have you any knowledge of strip music which is used solely by appealing to the mind through the eye? If so please produce a model of it, and say what you know about it.

[*Objected to as re-opening the examination-in-chief, and general.*]

Ans. I have arranged strip music to be used on an invention of Mr. E. P. Carpenter's, which appeals to the eye alone. The notes on the strip music as they roll from one roll to another, designate or point to the keys on the organ.

[*Witness produces a model which is now put in evidence and marked Complainants' Exhibit Carpenter Strip Music, W. A. C. Spl. Ex'r.*]

Int. 113. Please explain more fully as to the Carpenter Strip Music; for instance, what shows the duration, pitch and the like.

[*Objected to as irrelevant.*]

Ans. The music I arranged the same as I arrange for perforated music. The first notes of the tune have letters under them which are placed over corresponding letters on the key board. The length of notes is determined by the length of time that the notes on the paper are passing.

Re-cross-examination by CHARLES T. RUSSELL, Esq., de bene esse.

Cross-Int. 114. Is not what you call the Carpenter Strip Music a mere mechanical invention, to designate when and how long to press the keys of the piano?

Ans. I should not say that the strip music was the mechanical part. The machine on which the music is rolled certainly is.

Cross-Int. 115. There is a machine then which carries the printed or marked paper over the keys of the piano, and as it reaches them it indicates what key is to be pressed, and how long it is to be pressed, doesn't it?

Ans. It does.

Cross-Int. 116. And the only way it addresses itself to the sight is to mark out and tell the player when he is to touch a certain key, isn't it?

Ans. It is.

Cross-Int. 117. Then it is a mere machinery, is it not, to enable a party to play a tune mechanically?

Ans. I think it is no more machinery about the notes to this than there is to ordinary printed music, as it appeals to the eye.

Cross-Int. 118. Appeals to the eye for what?

Ans. To designate the note or notes to be played.

Cross-Int. 119. Is it necessary to play with it that the person playing with it should be able to read the ordinary notes of the music at all?

Ans. It is not.

Cross-Int. 120. Then the only difference between this and the perforated paper in the orguINETTE is that this tells the player when and how long to touch the key, while in the orguINETTE the reed is opened by the paper without the intervention of the fingers, isn't it?

Ans. That is the true difference.

Cross-Int. 121. And it isn't at all necessary for the use of the Carpenter invention that the player should be able to read or comprehend ordinary sheet music, is it?

Ans. I should say not.

Cross-Int. 122. And it is not necessary in the use of the perforated paper in the orguINETTE, any more than in the use of the Carpenter invention on the piano, that the person playing should be able to read or comprehend a note of music, is it?

Ans. It is not necessary. But a musician could play better on either.

Re-direct examination by MR. MAYNADIER.

Int. 123. As to the need of the person using certain sorts of music, to comprehend the ordinary sheet music. Do you know any other kinds of music except the perforated strip music and the Carpenter strip music which are intelligible or may be intelligible to a person wholly ignorant of the ordinary printed sheet music? If so please explain them briefly and produce samples, if you have them.

[*Objected to.*]

Ans. I have arranged music, and seen music called Dutch or Boer music. The notation is different from ordinary sheet music, the notes and clefs are different, but which is intelligible to a musician.

There is another kind of music coming into quite general use, called the Tonic Sol Fa System. A great many read the Tonic Sol Fa System, that can't read a note of ordinary printed music.

[The witness produces two samples marked Complainants' Exhibit Boer Music, and Tonic Sol Fa Music, W. A. C., Spl. Exr.]

Int. 124. As to the use of the perforated strip music to appeal to the eye. State what reason there is, if any known to you, why the perforated strip music is not admirably adapted for use with the Carpenter instrument.

[Objected to as irrelevant.]

Ans. The perforated sheets could be used and are just as well adapted for use with the Carpenter instrument. Long notes might weaken the paper.

[Re-Cross-Examination by CHARLES T. RUSSELL, Esq., of Counsel for Defendant, de bene esse.]

Cross-Int. 125. Are not the characters used in what you call the Boer Music and the Tonic Sol Fa used precisely and identically in every and all respects as the notes, marks, signs and so forth in our ordinary sheet music? And if not, for what are they used?

Ans. Yes, they are.

W. A. WEBBER.

Attest:

WM. A. COPELAND,
Special Examiner.

[The exhibits introduced by the Defendant's Counsel are taken away by Mr. Russell; by agreement.]

STIPULATION.

It is hereby agreed by counsel for the respective parties in the above entitled cause, that William A. Copeland may be appointed as Special Examiner to take testimony in behalf of both parties, pursuant to the sixty-seventh rule of the Supreme Court of the United States as amended.

J. E. MAYNADIER,
Counsel for Complainants.

C. T. & T. H. RUSSELL,
Counsel for Defendant.

BOSTON, Dec. 28, 1885.

[Present: *Counsel as before.*]

DEPOSITION OF WILLIAM E. RAND.

*Direct-Examination by J. E. MAYNADIER, Esq., of Counsel for Complainants.**Int. 1.* What is your name, age, residence and occupation?*Ans.* William E. Rand; 20; Athens, Tennessee; farmer.*Int. 2.* Do you know Mr. McTammany, the defendant, now present?*Ans.* I do not.*Int. 3.* Please look at the three things now shown you [*now put in evidence and marked Complainants' Exhibits Strip Music 2, 3 and 4*] and state whether you recognize either, and if so, which of them and what you know about those you recognize.*Ans.* I recognize this strip 2, by my initials and the date being on it. I purchased that piece of music at North Worcester, the 18th day of May, 1883.*Int. 4.* From what store did you buy it?*Ans.* Mr. McTammany's.*Int. 5.* Do you know the name of the individual who sold it to you?*Ans.* I do not.*Int. 6.* What work, if any, was being done in that store while you were in there?*Ans.* I saw three men cutting music with a punch.*Int. 7.* Please explain more fully as to your purchase of this roll of punched paper—that is, where the person who handed it to you took it from, and the general appearance of the store and the like.*Ans.* He took it from shelves in the back part of the store. The store door opened from the side next the Barre & Gardner Railroad. The tables where the cutting was being done were in the front of the store next the railroad, and the shelves where the music was stored were immediately behind the tables where the cutting was being done—in the basement of a brick house.

Int. 8. How about the quantity of music stored on these shelves.

Ans. From ten to fifty tunes on a shelf.

Int. 9. And in what form—the ordinary sheet music form, or a long strip of paper rolled into a roll?

Ans. The ordinary sheet music form.

Int. 10. What was on the shelf from which this long strip of music rolled into a roll was taken—Exhibit Strip Music 2?

Ans. Fifteen or twenty of the same kind

Int. 11. And what was on the other shelves? that is, long strips of punched paper rolled into rolls, or music printed upon flat sheets?

Ans. Long strips of punched paper, not rolled.

Int. 12. When you bought Exhibit Strip Music 2 was it rolled into a roll as it now is?

Ans. Not until it was sold me.

Int. 13. Did you buy any other long strips of punched paper from that store at that time? If so, state whether they were stamped or not, and if stamped, how the stamp compared with the circular stamp on Exhibit Strip Music 2.

Ans. I bought several pieces at the same time of punched music. The stamp was the same as on Strip Music 2—a circular stamp.

Int. 14. Was there any sign about the store? If so, what was it?

Ans. I saw no sign.

Int. 15. Do you recognize this gentleman sitting on your left?

Ans. I do not.

Cross-examination by CHARLES THEO. RUSSELL, ESQ.

Cross-Int. 16. The gentleman sitting on your left was not the person who made the sales to you, was he?

Ans. I don't know. The man I bought it of wore a full beard.

Cross-Int. 17. Was or was it not the defendant—the gentleman sitting at your left that you bought it of?

Ans. I don't know.

Cross-Int. 18. Do you know who the lessee or occupant of that room or building was at that time?

Ans. I don't know the lessee of the building. The occupant of the basement was Mr. McTammany.

Cross-Int. 19. How do you know the occupant of the basement, and all the way you know?

Ans. By what was told me at the music stores in Worcester, on Main street, that I would find him in this building, and by the stamp on his music.

Cross-Int. 20. And that is all you know, isn't it?

Ans. It is.

Cross-Int. 21. So that if that basement was leased and occupied by another person than Mr. McTammany, you didn't know anything about it, did you?

Ans. No, sir.

Cross-Int. 22. How came you and for what purpose did you make the purchase of the strip sheet you have identified?

Ans. I was sent there by the Automatic Music Paper Co. to purchase the music for purposes known to them only.

Cross-Int. 23. Didn't they tell you what they wanted of it?

Ans. Not at the time I purchased it.

Cross-Int. 24. Who sent you to purchase it?

Ans. Mr. Given.

Cross-Int. 25. Where were you then living?

Ans. In Jamaica Plain.

Cross-Int. 26. What were you then doing?

Ans. Clerk for the Automatic Music Paper Co.

Cross-Int. 27. Are you a relative of any of the partners or corporators of the Automatic Music Paper Co?

Ans. I am. I am son of the treasurer of the company.

Cross-Int. 28. And you went there for the purpose of getting the perforated strip you did get, for the purpose of being used in a suit at law, did you not?

Ans. I knew nothing of the law suit until after I purchased the music.

W. E. RAND.

Attest:

WILLIAM A. COPELAND,

Special Examiner.

[Adjourned.]

BOSTON, Dec. 29, 1885.

[Present: *Counsel as before.*]

DEPOSITION OF GILBERT A. DAGGETT.

Direct examination by J. E. MAYNADIER, Esq., of Counsel for Complainants.

Int. 1. What is your name, age, residence and occupation?

Ans. Gilbert A. Daggett; 26; Boston; vocalist.

Int. 2. Please state generally what experience you have had in musical matters?

Ans. I have been some 8 or 9 years at it—singing. At present am member of the Weber Quartette.

Int. 3. Please look at the piece of music now shown you, marked Complainants' Exhibit Common Sheet, and state whether you can read it at sight or not?

Ans. I can.

Int. 4. Have you ever had anything to do in any way with the manufacture, use or sale of music of any kind?

Ans. None.

Int. 5. Please look at the roll of perforated paper now shown you—Exhibit Strip Music 2—and compare it with Exhibit Common Sheet, and state whether it is a copy or not, in your opinion, of Exhibit Common Sheet.

[*Objected to as asking for incompetent evidence.*]

Ans. I should say it was.

Int. 6. Why?

[*Objected to as above.*]

Ans. In reading it compares with the copy there [*pointing to Exhibit Common Sheet*].

Int. 7. Please consider the two, note by note, beginning at the first note on Exhibit Common Sheet.

Ans. This first brace or prelude [*on the Common Sheet*] is not on the Strip Sheet. I find that compares there. The two bars that I have read compare here.

Int. 8. What is the first note after the prelude in Exhibit Common

Sheet and what the first note in Exhibit Strip Music 2? What the second note in each, and the relation of the second to the first, and so on for, say fifteen or twenty notes?

[*Objected to as assuming that there are notes on the perforated paper, which the witness has not stated.*]

Ans. The first note in this strip is a dotted eighth, equal in value to the one in here (in the Common Sheet). The second note is a third as long, or a sixteenth note, and the third note the same as the first. The second note is a third below the first one—or three tones—counting the first one as a tone. The third note is a fourth below the first one, or one below the last one. The third note is a dotted eighth, or three times as long as the one previous. The next note is a third above the last one, and is a third as long as the last. The next note is one below. It is a quarter note. The next one is a fourth below, and a quarter note. The next note is one above, a dotted eighth, three-quarters as long as the last one. The next note is two above, a sixteenth, just a third as long as the last preceding. The next is a fifth below, three times as long as the one preceding. The next one is four above. This isn't. I have made a mistake there. The eighth one that I gave there should be a sixth below. Then the next one to that is a third. The next one is one.

Int. 9. What experience, if any, have you had in reading this perforated strip music?

Ans. I have had no experience at it, simply what I have seen in the stores. I have picked it up and looked at it.

[*At request of Defendant's counsel the magistrate notes that in answering the 8th int. the witness had the printed sheet before him, comparing one with the other.*]

Int. 10. Have you compared the whole of Exhibit Common Sheet with Exhibit Strip Music 2?

Ans. All the way through? No, I have not all the way through.

Int. 11. So far as you have compared it, have you found any notes on Strip Music 2 not copied literally from Exhibit Common Sheet? If so, state why they were not copied literally, so far as your musical knowledge enables you to do so.

[*Objected to as leading.*]

Ans. I should have to look through the whole thing in order to

answer that—examine the whole piece. I find in the seventh bar a note is carried an octave lower—the first note is carried an octave lower. The reason would be because the note higher is not in the orguINETTE.

Cross-Examination by CHARLES THEODORE RUSSELL, Esq., of Counsel for Defendant.

[*The witness here states that he wants to change his last answer.*] The first note in the seventh bar is two notes lower—that is what I meant to have said, for the same reason—that the note is not in the orguINETTE.

Cross-Int. 12. What do you mean by a note not being in the orguINETTE?

Ans. The top note in this paper represents the last note of the orguINETTE.

Cross-Int. 13. What has the orguINETTE to do with the perforated paper?

Ans. It plays the tune.

Cross-Int. 14. Then that perforated paper is cut and made, is it not, for the sole purpose of playing a printed and published tune upon the orguINETTE by mechanical means?

Ans. It is made to play whatever tune is cut for it. [*Question re-read.*] Certainly—it is made to play through the orguINETTE.

Cross-Int. 15. And that is its sole purpose, isn't it?

Ans. I suppose so. I don't know. I am not in the business. It is made to sell. It is just the same as this piece of music [*holding up Exhibit Common Sheet*].

Cross-Int. 16. Can it be used for any other purpose, and if so, what?

Ans. You could sing from it if necessary.

Cross-Int. 17. Do you mean to say that those perforated papers would ever be used to sing from in place of the printed sheet?

Ans. It might be so if the customer required it according to these ages. As we advance on we get new ideas.

Cross-Int. 18. At present, and with present ideas, do you think it would ever be used for the ordinary purposes and in the place of the ordinary music sheet?

Ans. It might be.

Cross-Int. 19. Might be when, and how, and by whom?

Ans. By those that wanted to use it.

Cross-Int. 20. Who would want to use it in that way?

Ans. Those that took a fancy to read that way. Some read one way and some another.

Cross-Int. 21. Do you mean to say upon your knowledge as a musician that anybody would purchase and use one of those perforated sheets for the ordinary purpose and in place of the ordinary music read by the eye?

Ans. They might do so.

Cross-Int. 22. That don't answer the question. Read the question once more.

[*Question re-read.*]

Ans. They might. I couldn't answer for other people.

Cross-Int. 23. Did you ever know it done? and if so, when, where and by whom?

Ans. No. I never knew it.

Cross-Int. 24. If the manufacturers of these perforated strips have stated in this case, substantially, that these perforated strips are made exclusively for the purpose of performing by mechanical means a tune on the orguINETTE, and that such use and purpose is entirely different from the use and purpose of the ordinary music sheet, do you concur with or differ from them?

Ans. I couldn't say whether they have or not.

Cross-Int. 25. Assuming that they have, do you concur or differ from them?

Ans. Will you please read the question again? [*Question re-read.*] I don't just get the question now in my mind. [*Question re-read and witness takes the paper and reads the question himself.*] They might be used for other purposes.

Cross-Int. 26. Then you do not concur with them, do you?

Ans. Well, what my answer to that would be that I could take this [*holding up the Exhibit Strip Sheet*] and play from it as well as from the sheet music. That's what I meant.

Cross-Int. 27. What other objects could it be used for?

Ans. I could take the music and set it up to the piano and play it—the melody.

Cross-Int. 28. Setting aside the question whether you could play from the perforated sheet, what is the object and purpose, and sole object and purpose for which the sheet is perforated, instead of being written with the ordinary notes, lines, musical expressions, and so forth.

Ans. It is made to run through the orguINETTE.

Cross-Int. 29. And that is the sole purpose for which it is ever made, isn't it?

Ans. I suppose so.

Cross-Int. 30. Can the ordinary music sheet be played mechanically upon the orguINETTE without the notes being transferred and cut in the perforated paper, which is by mechanical means to be made to traverse across the reeds of the organ?

Ans. I should think not.

Cross-Int. 31. Wherein does the perforated paper, in its function and purpose, in a musical instrument, differ from the barrel of a hand organ?

Ans. I couldn't say.

Cross-Int. 32. Wherein, in its function and purpose, does it differ from the use of the human fingers on the keys of a piano?

Ans. You play the piano by the fingers, and the other way you play by crank.

Cross-Int. 33. How do you play by crank so as to get the notes?

Ans. This paper [*Exhibit Strip Sheet*] is drawn over the reeds.

Cross-Int. 34. In your answer to question 5, what do you mean by a copy?

Ans. The notes are represented on here [*Exhibit Strip Sheet*] the same as on the common paper. The distances on here [*the Strip Sheet*] are the same as on the other paper.

Cross-Int. 35. Do you mean to say that the notes on the ordinary sheet are copied on the perforated paper; or do you mean to say that the perforations in the paper enable it, as it traverses the reeds in the organ, to play the notes in the printed sheet?

Ans. I mean that these notes [*on the Strip Sheet*] represent the notes in the common copy.

Cross-Int. 36. That is to say, all you mean to say is, that the cuttings and perforations in the paper correspond to the notes in the music sheet?

Ans. The melody is copied.

Cross-Int. 37. Correspond then to the notes and melody?

Ans. With some changes.

Cross-Int. 38. Why are the changes made?

Ans. On account of the orguINETTE.

Cross-Int. 39. Then the first process would be, would it not, to adapt the tune to the orguINETTE?

Ans. Yes, sir.

Cross-Int. 40. And the next process would be to cut the notes and melody in perforated papers so as to put it by mechanical means through the orguINETTE, wouldn't it?

Ans. Yes.

Cross-Int. 41. Are there not in the sheet music shown you 29 staves, 145 lines, 174 spaces, 28 measures, 8 braces, 23 bars, 3 double bars, 6 different notes, 131 dots which add one-third to their value, 29 clefs, 2 kinds of clef, G and F, one sign of time, 5 slurs, 9 ties, 18 characters representing expression, 25 rests, 2 kinds of rests, 21 accidental sharps, 7 naturals, 2 verses consisting of 80 words and 1 chorus of 28 words which are not in or in any way represented in the perforated paper.

Ans. About that.

Cross-Int. 42. Do you mean to say, without reference to or knowing the sheet music from which it is taken, and without having heard it played, you can read the perforated papers so as to give the tune?

Ans. I think I could.

Cross-Int. 43. Please look at the exhibit shown you—Defendant's Exhibit Perforated Sheet C—and tell me what the tune is.

Ans. I should say it was Seymour.

Cross-Int. 44. What informs you in the perforated sheet that the perforations are musical notes?

Ans. Instinct.

Cross-Int. 45. And nothing but instinct does it?

Ans. Instinct and what knowledge I have of what I have read of it.

Cross-Int. 46. Have you had much knowledge or practice in reading the perforated strip music?

Ans. None, save what I have picked up in the store and read, and what little I have read here just now.

Cross-Int. 47. There is nothing in the perforation of the paper that in itself, alone, is a copy of a musical note, is there?

Ans. Well, the holes represent a note. If I should see a hole and one a third above it, and one a fifth and one an eight, I should know it was a chord.

Cross-Int. 48. And you would know it as by representation and not by copy, wouldn't you?

Ans. Know it by both.

Cross-Int. 49. Then you mean to say that the perforated slits and squares are copies of the notes of music, do you?

Ans. Yes, they are copies.

Cross-Int. 50. How copies? In the same sense that one musical note is the copy of another?

Ans. Those holes are made long or short according to the copy of the note.

Cross-Int. 51. Why are the holes made at all, or made long or short according to the copy of the note instead of the notes being printed on the paper?

Ans. So as to play the melody.

Cross-Int. 52. Play the melody how and where?

Ans. Play it on the orguINETTE.

Cross-Int. 53. Doesn't it then, come to this, that all the cutting on the perforated sheet is solely and exclusively to enable it to be used as a part of the mechanism in an orguINETTE?

Ans. Yes.

Cross-Int. 54. Doesn't, then, the perforated sheet and the atmosphere and the associated mechanism do for the tune exactly what the player does when he plays it upon an instrument? And if not, wherein does it differ?

Ans. It does.

Re-Direct Examination by J. E. MAYNADIER, Esq., of Counsel for Complainant.

Int. 55. State what knowledge, if any, you had of Exhibit Perforated Sheet C before it was put into your hands by counsel for Defendant?

Ans. I had no knowledge.

Int. 56. When was the first time you ever saw it or ever heard of it, directly or indirectly?

Ans. The present time.

G. A. DAGGETT.

Attest:

WM. A. COPELAND,
Special Examiner.

[*Adjourned.*]

BOSTON, Dec. 30, 1885.

[Present: *Counsel as before.*]

DEPOSITION OF GEORGE SWIFT.

Direct Examination by J. E. MAYNADIER, ESQ., of Counsel for Complainants.

Int. 1. What is your name, age, residence and occupation?

Ans. George Swift; 23; Cambridge, Mass.; arranger of music.

Int. 2. By whom are you now employed and how long have you been so employed?

Ans. By the Automatic Music Paper Co.; about 14 months.

Int. 3. Please look at Exhibit Common Sheet and state whether you read it readily or not, and compare it measure by measure with Exhibit Strip Music 2, and state what of the former is in the latter.

Ans. I read it readily. The first note in the Strip Music compares exactly with the first note in the Common Sheet. It is a dotted eighth. The next is a sixteenth, a third below the preceding. The next is a dotted eighth, one interval below the preceding. They are exactly alike in the Strip Music and Sheet Music. The fourth is a sixteenth, a third above the preceding note. The fifth is a quarter note, one interval below the preceding. The sixth is a quarter note, a fourth below the preceding. The seventh is a dotted eighth, one interval above the preceding. The eighth is a sixteenth, a third above

the preceding. The ninth is a dotted eighth and is a fifth below the preceding. The tenth is a sixteenth, a third above the preceding. The eleventh is a dotted quarter—no it is a half, I am wrong. The twelfth is a dotted eighth, one interval above the preceding. The thirteenth is a sixteenth, one interval above the preceding. The fourteenth is a dotted eighth, one interval above the preceding. The fifteenth is a sixteenth, one interval above the preceding. The sixteenth is a dotted eighth, one interval above the preceding. The seventeenth is a sixteenth, one interval above—no, on the same line. The eighteenth is a dotted half, and it is a tone below. The nineteenth is a dotted eighth, a third above. The twentieth is a sixteenth, a third below. The twenty-first is a dotted eighth, a tone below. The twenty-second is a sixteenth, a third above. The twenty-third is a quarter note, a tone below. The twenty-fourth is a quarter note, a fourth below. The twenty-fifth is a sixteenth note, a tone above. The twenty-sixth is a dotted sixteenth, a third above. The twenty-seventh is a dotted sixteenth, a fifth below. That is wrong, a dotted eighth. The twenty-eighth—that is a third above. The twenty-ninth is a dotted quarter, a tone below. The thirtieth is a dotted eighth, a fifth above. The thirty-first is a sixteenth, a fourth below. The thirty-second is a dotted eighth, a fifth above. The thirty-third is a sixteenth, a note below. The thirty-fourth is a sixteenth, a note below. The thirty-fifth is a dotted eighth, a note below. The thirty-sixth is a dotted eighth, a note below. The thirty-seventh is a sixteenth, a note above. The thirty-eighth is a dotted half and is a tone above. The thirty-ninth is a dotted eighth; it is a tone above. The fortieth is a sixteenth, a third below. The forty-first is a dotted eighth, and a third below. The forty-second is a sixteenth, a third above. The forty-third is a quarter note; it is a third above. The forty-fourth is a quarter note, a fifth below. The forty-fifth is a dotted sixteenth—a dotted eighth, a sixth above. The forty-sixth is a sixteenth note, a third below. The forty-seventh is a dotted eighth, a fourth below. The forty-eighth is a sixteenth note, a fourth above. The forty-ninth is a half note; it is a third above. The fiftieth is a dotted eighth; it is an accidental note and is—well, call it a seventh. The fifty-first is a sixteenth note; it is a seventh above the one before it. The fifty-second is a dotted eighth; it is a tone below. The

fifty-third is a sixteenth, a tone below. The fifty-fourth is a quarter note, a tone below. The fifty-fifth is a quarter note, a tone above. The fifty-sixth is a dotted half note, and is a tone above. The fifty-seventh is a dotted eighth note, a tone above. The fifty-eighth is a sixteenth note, a third below. The fifty-ninth is a dotted eighth, a tone below. The sixtieth is a sixteenth note, a third above. The sixty-first is a quarter note. This is the sixty-first that we are working on now? A tone below. The sixty-second is a quarter note, a fourth below. The sixty-third is a dotted eighth; it is a tone above. The sixty-fourth is a sixteenth; and is a third above. The sixty-fifth is a dotted eighth, and is a tone above. The sixty-sixth is a sixteenth, on the same line. The sixty-seventh is a dotted quarter note, a note above the preceding. The sixty-eight is a dotted eighth, a tone below. The sixty-ninth is a sixteenth note, a tone above. The seventieth is a dotted eighth, a tone below. The seventy-first is a sixteenth, a fourth below. The seventy-second is a dotted eighth, a third above. The seventy-third is a sixteenth, a tone below. The seventy-fourth is a dotted eighth, a tone below. The seventy-fifth is a sixteenth, a tone above. The seventy-sixth is a dotted half, a tone above. The rest is a repetition of what has gone before—I don't mean note for note, but substantially the same thing.

Int. 4. In your answer you say a *tone* above or below, a *note* above or below, an *interval* above or below, and sometimes a *third* or the like above or below. Please explain the meaning of these terms.

Ans. I started to use the word *interval* when the next note was on the next line or space above or below it, but I thought that it would be more easily understood by saying *tone*, as I used them both in the same meaning. By a *third* I mean that it is three notes higher, counting the one you start from. That is all. I don't know whether it answers the question. As near as I know it has.

Int. 5. Now please compare the first measure of Exhibit Common Sheet with the first measure of Exhibit Strip Music 2, and state what notes in one are exactly reproduced in the other, and what notes are not exactly reproduced; and if any are not exactly reproduced, please state why, as nearly as your knowledge of music will enable you to do so.

Ans. The air is exactly the same. The bass is exactly the same. Please put that the lower part. In the first chord the next to the

lower note is put an octave above its place in the printed sheet, which does not change the chord. In the next chord two notes are left out, but the chord is the same. The second and third are the same as the first, I should have said. I made a mistake there which I mean to correct. Instead of the second note being transposed, it is the lowest note—that is all.

[Last part of question re-read.]

The gentleman that arranged this music may have had ideas in his mind that I know nothing about. The music that he has written here is correct—that is all.

[The answer being read to witness, he says:]

May I say something here? Instead of saying the second and third are the same I should have said the third and fourth, because I had just given the second one before that.

Int. 6. Had you arranged Exhibit Common Sheet for the fourteen note orguINETTE, what would have been the probable difference between the perforated strip as arranged by you and Exhibit Strip Music 2.

[Objected to as irrelevant and incompetent.]

Ans. I don't believe there would have been any difference.

Int. 7. What is the duty of an arranger of music?

Ans. Do you wish me to give the process? *[Counsel says, "the duty, what you have to do."]* I take my common sheet, place it before me on the bench. I take my paper and apply my scale to it and I reproduce, that is copy, the music from the common sheet on to it, making as exact a copy as is a possible thing. That finishes my part of it.

Int. 8. Have you had any experience in arranging music for other instruments than the orguINETTE and the like? If so, what?

Ans. I have had experience in arranging for about twenty varieties of instruments, I should judge. If you wish the names of the instruments I will give them to you.

Int. 9. Please find a measure in Exhibit Common Sheet which differs most widely from the corresponding measure in Exhibit Strip Music 2, and explain the reasons for the differences, so far as your musical knowledge enables you to do so.

Ans. Take the seventh measure. There is a difference—not a wide difference. The reason of it is that the note in the music is one

note higher than the last note in the orguINETTE. A note of the same chord is placed down, giving the same impression as would otherwise be made.

Int. 10. You have spoken only of the melody. Please consider the entire measure.

Ans. The chord is the same—that is, the harmony—throughout the measure.

Int. 11. The lowest staff in the seventh measure has four bass notes in it all of the same length, the second a third below the first, the third a fourth above the second, and the fourth an octave below the third. How is it in the Strip Music 2 and why?

Ans. The lower notes are different. The second one is on the same line with the first, the other two are a tone below, but the chords are the same, and it produces the same effect.

[*Last part of question re-read.*]

On account of the notes in the orguINETTE—on account of the scale of the instrument.

Int. 12. When you arrange music, what more do you do than copy music written for an instrument of one scale so as to make it music for an instrument of a different scale?

[*Objected to as leading.*]

Ans. I don't know as I understand that question; will you let me read that please? [*Witness takes the paper and reads the question himself.*] If I understand your question aright I mean by copying music for a different scale, if it is a larger scale, (I mean by that more notes in it) I can make the harmony fuller and the notes that are too high for the fourteen note, I can reproduce and thus make a more exact copy of the original music.

Int. 13. What experience have you had in reading strip music?

Ans. I have had the experience of working in the shop.

Int. 14. Do you believe that you can read strip music at sight as well, for instance, as you can common sheet music?

[*Objected to as incompetent.*]

Ans. I don't believe I can quite as well, because I have studied common sheet music since I was seven years old.

Int. 15. Do you know the music on Complainants' Exhibit Carpenter Strip Music?

[*Objected to as incompetent and irrelevant.*]

Ans. I never saw it before.

Int. 16. Please see if you can read it.

[*Objected to as above.*]

Ans. I can read that. [*Witness whistles.*] I should say it was Nearer My God to Thee.

Int. 17. Did you ever see the thing now shown you [*now put in evidence and marked Complainants' Exhibit Woods Model, W. A. C. Spl. Exr.*]

[*Same objection.*]

Ans. I never did.

Int. 18. See if you can read the strip music on it.

Ans. [*Witness whistles.*] There are two tunes on there. I don't know the name of either. "A Charge to Keep I Have" goes with one of them. I don't know the other—if anybody can tell, I can't—I mean the name of it.

[*Counsel for defendant requests magistrate to note that the witness whistled it over two or three times and spent some time in deliberation before answering—the same also with reference to the preceding Exhibit.*]

Int. 19. Were you present when defendant's counsel asked Mr. Webber to read three pieces of perforated music and Mr. Daggett to read one of those pieces?

Ans. I believe I was. Yes, sir.

Int. 20. Please find on the perforated music, Exhibit Strip Music 2, the measures which compare with the first four measures of the chorus at the top of page 5 of Exhibit Common Sheet, and state what notes of the Common Sheet are copied exactly and what are arranged.

[*Objected to as leading.*]

Ans. In the air, the second note is changed on account of the accidental note. The fifth note is changed. The fourth note in the second measure is changed. The second note in the third measure is changed. The accompaniment is the same chords throughout. The alto is the same, and the other parts are embraced in the accompaniment.

Cross-Examination by CHARLES T. RUSSELL, Esq., of Counsel for Defendant.

Cross-Int. 21. In making your comparison and reading Complainants' Exhibit Strip Music 2, you have had the original sheet music in your hand and constantly before you, have you not?

Ans. I have.

Cross-Int. 22. Have you ever arranged sheet music, Cradle's Empty, for the orguINETTE?

Ans. I never have.

Cross-Int. 23. Have you ever seen it as arranged for the orguINETTE, other than the comparison you have made today?

Ans. Do you mean like that? [*referring to Exhibit Strip Music 2.*] [*Counsel answers, yes.*] I can't say that I have ever seen it to examine it as closely as that. I have seen workmen carry it around the shop, but I have never examined it, to know it.

Cross-Int. 24. Now I notice that in going over the perforated strip sheet in making your comparison with the printed sheet you hum or whistle the notes and beat time with your fingers. Am I right in that?

Ans. You are.

Cross-Int. 25. I notice the same thing in your reading of other perforated strips. Am I right in that?

Ans. Yes, sir.

Cross-Int. 26. Why do you do that?

Ans. In the first place, from force of habit. In the second place, no musician ever plays a tune, or sings or whistles it without beating time in some way or other.

Cross-Int. 27. Is that all the answer you can give me to the last question?

Ans. Will you please read the question once more? [*Question re-read.*] That seems to me to answer it. I have answered the question to the best of my ability.

Cross-Int. 28. I noticed in your humming and whistling the notes and beating the time you frequently, if not always, began at some distance from the beginning of the perforated paper, am I right in that?

Ans. I don't know whether you are or not. As I say, if it is a habit of mine doing that, and I do it not thinking, I can't answer the question.

Cross-Int. 29. Do you mean on your oath to swear that the only reason of your doing that was because it was a habit of yours?

Ans. That's the only reason I did it, as I always do it.

Cross-Int. 30. And it wasn't done at all to aid you in reading the music, was it?

Ans. It aided me in one way, because a musician is so accustomed to it that he does it instinctively, and if he does not beat time with his hand it is done some way or other.

Cross-Int. 31. You noticed, did you not, that Mr. Webber and Mr. Daggett did the same thing in reading the sheet music the other day?

Ans. I didn't notice at all whether they did or not.

Cross-Int. 32. Do you mean to say, with all your experience as an arranger, you can read a perforated strip of music with which you are not previously acquainted, without whistling or humming the notes or beating time in any form?

Ans. I cannot read any style of music without beating time, that I know of. [*Counsel says, this question means perforated.*] No, sir.

Cross-Int. 33. Then you have, in reading the perforated strip music, to pick it up by humming, whistling and beating as you go along, do you not?

Ans. No, sir, not all three.

Cross-Int. 34. Well, which?

Ans. Time is essential—that's all.

Cross-Int. 35. Now, does not an ordinary musician read a printed sheet of music just as readily and easily in all respects as an ordinary reader reads a printed page?

Ans. An ordinary musician would have some difficulty in reading some printed music.

Cross-Int. 36. As a general thing, I mean.

Ans. Ordinary class of composition, and no more.

Cross-Int. 37. Would you call Cradle's Empty, an ordinary composition?

Ans. I should.

Cross-Int. 38. Now, what is there on the perforated strip sheet to indicate to an ordinary musical reader, familiar only with sheet music, that the perforations are musical notes?

Ans. The positions in which they are placed, the length of the perforations, and a little common sense.

Cross-Int. 39. Where does the common sense appear on the perforated sheet?

Ans. When he sees the manner in which they are arranged, that is, one following after the other, if he was a musician of ordinary ability, I should think he would call it music.

Cross-Int. 40. Is there anything else indicated than what you have stated?

Ans. Do you mean on the perforated sheet? [*Counsel says, yes,*] Yes, sir, the rests are indicated.

Cross-Int. 41. How are they indicated?

Ans. By blank spaces having no perforations.

Cross-Int. 42. Then in the strip sheet Complainants' Exhibit Strip Music 2 do the blank spaces indicate rests, and only rests?

Ans. Not "and only rests," No, sir.

Cross-Int. 43. Well, what is there on the strip to show when they do and do not indicate rests?

Ans. I should think the shortest distances between the holes—and absence of notes.

Cross-Int. 44. What is there on the strip sheet to indicate the value of the notes?

Ans. The length of the perforations.

Cross-Int. 45. How are the rests indicated on the printed sheet music?

Ans. By musical characters.

Cross-Int. 46. How is the value of the notes indicated on the printed sheet?

Ans. By musical characters.

Cross-Int. 47. Now in view of what you have now stated, will you state what you mean, and all you mean, when you say in answer to the second int., that the strip sheet—Exhibit Strip Music 2—is an exact copy of the printed sheet—Cradle's Empty?

Ans. I mean that the music is transferred from the sheet music to

the strip music as nearly as is a possibility, the differences being so slight that none but a good musician would notice them, I don't think.

Cross-Int. 48. For what use and purpose is this transfer made?

Ans. I don't know as I get exactly what you mean. [*Counsel Explains.*] Well, to play on the instrument.

Cross-Int. 49. Then it is so transferred, is it not, to make a strip sheet which, as a mechanical agency, will play the tune automatically on the organ.

Ans. What is properly meant by "mechanical agency," I know nothing about. I am no machinist myself.

Cross-Int. 50. Isn't the orguINETTE called the mechanical orguINETTE?

Ans. Yes, sir.

Cross-Int. 51. [*Counsel says,*] will you not now repeat the question—[*question re-read.*]

Ans. Yes, sir.

Cross-Int. 52. Now in arranging a tune for the orguINETTE, you first adapt it by such changes as are necessary for the particular instrument, do you not?

Ans. Yes, sir.

Cross-Int. 53. Then as thus adapted, you cut it into a stencil, do you not?

Ans. It is cut by workmen.

Cross-Int. 54. And then it is cut from the stencil into the perforated sheet, is it not?

Ans. Yes, sir.

Cross-Int. 55. And the perforated sheet is cut for the sole purpose of being carried by mechanical means over the reeds of the organ, and playing the tune, is it not?

Ans. With regards to its being the sole purpose, I do not know, as I am only an employ   at the factory.

Cross-Int. 56. Don't you know that it is the main purpose, and have you ever known of its being employed for any other, and if so, for what purpose?

Ans. I believe that is the main purpose. I have used it for other purposes. I have taken it and put it on a cabinet organ and played it.

Cross-Int. 57. But that is not the purpose for which it is manufactured, is it?

Ans. I should say not.

Cross-Int. 58. If the complainants state in their original bill that by recent ingenious inventions and discoveries in musical instruments and appliances for the performance of musical compositions in such instruments, a musical composition may be performed upon certain musical instruments called and known as orguinettes, organettes and organinas, by means of long sheets or strips of perforated paper, which said sheets or strips of paper are constructed with perforations, through which the passage of air coming in contact with reeds or other sounding devices, produces a performance of a musical composition, would it state fully and completely the purpose and function of the perforated strips?

Ans. I should think so.

Cross-Int. 59. Now, if the complainants state, substantially, that the new style, (meaning the perforated strips,) is adapted and intended for a use wholly different from any use possible to be made of the old style, (meaning by the latter, ordinary sheet music,) would such statement in your judgment, be true and correct?

Ans. I can't answer that question, because I don't know.

Cross-Int. 60. How is the degree or extent of the rise and fall of the notes indicated in the perforated strip?

Ans. I should think in the same way as in a common sheet of music—the distance down or up. I read common sheet music by position and not by letter, and that is the way I read this, [*referring to Exhibit Strip Music 2.*]

Cross-Int. 61. What is there on the perforated strip to indicate the degree of rise or fall?

Ans. I should say the distance below or up of one note above or below the other.

Cross-Int. 62. What indicates it on the printed sheet?

Ans. A series of lines and spaces.

Cross-Int. 63. Are these lines and spaces on the perforated sheet?

Ans. No, sir.

Cross-Int. 64. What indicates time on the printed sheet?

Ans. This mark here—this mark C. It means common time, but it don't amount to anything.

Cross-Int. 65. What is the meaning of common time?

Ans. Four quarter notes in a measure, or their value.

Cross-Int. 66. What is there on the perforated strip to show this?

Ans. The rhythm of the tune.

Cross-Int. 67. What mark or perforation, I mean, is there on the perforated strip?

Ans. There is no mark of time.

Cross-Int. 68. What is the signature in the piece of printed music—Exhibit Common Sheet?

Ans. I should call that the key of C.

Cross-Int. 69. What is its use and purpose?

Ans. It means that the first note in a scale, or the foundation note, is C.

Cross-Int. 70. What is there to indicate that upon the perforated strip?

Ans. Nothing.

Cross-Int. 71. What part of the measure does the ^{tune}~~time~~ begin on?

Ans. At the beginning of the measure.

Cross-Int. 72. Is this important in the tune?

Ans. That that should begin at the beginning of the measure, you mean? In that tune, yes, sir.

Cross-Int. 73. What is there to indicate that in the perforated strip?

Ans. I should say the rhythm of the tune.

Cross-Int. 74. What indicates it in the printed music sheet?

Ans. Why, it indicates—What indicates what, do you mean?

[*Counsel requests the preceding questions and answers to be re-read.*]
Well, the note, that is all, the position of it—the place in the measure that it is.

Cross-Int. 75. What does the division of the staff into measures in the printed sheet indicate?

Ans. It indicates that there are four counts. Well, it is rather hard to answer—a measure is a measure—it is four counts.

Cross-Int. 76. What is there on the strip sheet to indicate the measure?

Ans. Nothing but the length of the notes indicate it.

Cross-Int. 77. What does the character at the commencement of the tune on the printed sheet indicate, and what is it?

Ans. It is a clef. It has no need to be there. It shows the place for the letters. It makes a foundation letter.

Cross-Int. 78. What is its purpose or use?

Ans. Well, it is used to designate the letter on which it is placed.

Cross-Int. 79. Does it appear on the perforated strip?

Ans. It does not.

Cross-Int. 80. When you speak of the perforated strip as being a copy of the notes on the sheet music, you mean, do you not, that the perforation in the strip plays the same note in the playing of the organ that is represented by the corresponding note in the printed sheet?

Ans. That I can't answer absolutely, because I do not know how high or low the organ has been tuned on which it plays.

Cross-Int. 81. That is its object and purpose, is it not?

Ans. That is, to play the very same note that you would play from the sheet music, do you? [*Counsel says, yes.*] Not of the same pitch, no.

Cross-Int. 82. Is or not the perforation in the paper made for the purpose of having the perforation in passing over the reeds, play the same note in the orguINETTE with which the perforation is supposed to correspond in the music sheet?

Ans. The same relative position.

Cross-Int. 83. Do you mean to say it is or is not so intended?

Ans. It is intended to play the notes in the same relation to each other as they are in this copy here. [*Exhibit Common Sheet.*]

Cross-Int. 84. What do you mean by the term "pitch" in your answer to the 81st question?

Ans. By "pitch" I mean the number of vibrations.

Cross-Int. 85. You speak, in your answer to question 7, of arranging a tune. What do you mean by that? Arranging it for what?

Ans. Arranging it so that it can be played—arranging it onto this paper, [*referring to the perforated sheet,*] so as to reproduce the tune.

Cross-Int. 86. Reproduce it how and for what?

Ans. I don't exactly get what you want.

Cross-Int. 87. What do you do to reproduce it, and for what purpose do you reproduce it?

Ans. Well, I copy the notes from one to the other. I don't see how I can answer it any different. I reproduce it to get a tune to put on the instrument.

Cross-Int. 88. Why do you cut it into paper in slits and squares, instead of copying it in ink directly from the tune?

Ans. Well, if I did copy it in ink, it wouldn't be worth anything for the orguINETTE when I got through.

Cross-Int. 89. What is there in the perforated strip to indicate what are called notes in the ordinary printed music sheet?

Ans. Perforations.

Cross-Int. 90. Why are these perforations used instead of notes?

Ans. All I know is, if the perforations were not there, there would be no music played.

Cross-Int. 91. In arranging music, as you call it, for the orguINETTE, why do you omit or change notes?

Ans. On account of the limited scale of the instrument,

Cross-Int. 92. For what in the printed sheet is Cradle's Empty arranged?

Ans. For piano and voice.

Cross-Int. 93. For how many voices?

Ans. One and four.

Cross-Int. 94. Have you been present during the testimony of the other witnesses in this case?

Ans. Part of them.

Cross-Int. 95. Are there not 29 staves, 145 lines, 174 spaces, 28 measures, 8 braces, 23 bars, 3 double bars, 6 different notes, 131 dots, which add one-half to the value of the notes, 29 clefs, 2 kinds of clefs—G and F—1 sign of time, 5 slurs, 9 ties, 18 characters representing expression, 25 rests, 2 kinds of rests, 21 accidental sharps, 7 naturals, and the verses and chorus, which appear in the original printed sheet of Cradle's Empty, which are not in the perforated strip, Exhibit Strip Music?

Ans. Not all of them.

Cross-Int. 96. Well, which of them are on both?

Ans. The notes.

Cross-Int. 97. Anything else beside the notes that is specified in the above question?

Ans. I should think the rests.

Cross-Int. 98. Anything else?

Ans. That's all, I should say.

Cross-Int. 99. Now are not all these that you say are left out from the perforated slip, so left out to adapt and arrange it and cut it for the orguINETTE?

Ans. The most of them are left out as being superfluous.

Cross-Int. 100. What do you mean by superfluous?

Ans. I mean that I can take this piece of music—the Exhibit Common Sheet—and cut it down at least one-half of the figures that have been read to me in a preceding question, and I can play that music just as if they were there.

Cross-Int. 101. How about the other half?

Ans. In saying one-half, I made a rough estimate. To reduce it down, if you will erase everything on that sheet of paper but the notes, I will play it correctly.

Cross-Int. 102. And that is precisely what you do practically in cutting it into the paper, isn't it? Erase everything but the notes and then cut the notes so that the paper passed through the orguINETTE, will play them?

Ans. I erase nothing—I copy.

Cross-Int. 103. Did you understand my question?

Ans. I answered it to the best knowledge of your question?

Cross-Int. 104. [*Counsel for defendant requests the magistrate to re-read the question 102, and explain that it is not the modus operandi that is desired. The question says "practically."*]

Ans. That is all I copy.

Cross-Int. 105. Why, in general, are all these things that you say are superfluous put into the printed music?

Ans. Without these marks, it would be more difficult to learn. That is one reason. Another reason is that a person who plays an instrument from one part alone would be unacquainted with reading of the other parts.

Cross-Int. 106. And none of these are necessary for the use of the perforated strip, and none of them could be well transferred to it, could they?

Ans. I shouldn't think so.

Cross-Int. 107. Will you look at the exhibit now shown you [*now put in evidence and marked Defendant's Exhibit Perforated Sheet D,*] and tell me without humming, whistling or beating time, in the first instance, what it is?

Ans. [*The witness requests for time to answer.*] I don't know the name of it. [*This was said after the witness had taken some time for reconsideration.*]

Cross-Int. 108. Now examine it by whistling, humming or beating time and tell me what it is.

Ans. I don't see that there is any regular tune to it.

Cross-Int. 109. Please look at Defendant's Exhibit Perforated Sheet E—[*Now put in evidence,*] and examine it, first, without whistling, humming or beating time; and then examine it with humming, beating or whistling and tell me what it is.

Ans. I don't believe that's anything I know, [*after humming and whistling.*]

Cross-Int. 110. Will you please listen to the Exhibit Perforated Sheet D, as it goes through the orguINETTE, and see if you recognize it?

Ans. [*Defendant puts the strip through the orguINETTE.*] I don't know the name of it.

Cross-Int. 111. Will you take the printed sheet of Complainants' Exhibit Common Sheet, and tell me if you recognize it.

Ans. I do recognize it—It is Cradle's Empty, Baby's Gone.

Cross-Int. 112. Now will you listen to Defendant's Exhibit Perforated Sheet E, as it goes through the orguINETTE, and tell me if you recognize the tune.

Ans. I think I recognize it—It is Praise God from all blessings flow—Old Hundred—a very imperfect one too.

Cross-Int. 113. What do you mean by "a very imperfect one"?

Ans. I mean that in the beginning of that it could have been arranged more perfectly.

Re-Direct Examination by J. E. MAYNADIER, Esq., of Counsel for Complainants.

Int. 114. Please take Defendant's Exhibit Perforated Sheet D and compare it with the Complainants' Exhibit Strip Music 2, and see how the staves differ, if at all.

Ans. Perforated Sheet D seems to me altogether different—the arrangement—there are more notes in it, and cut uneven.

Int. 115. Please run Exhibit Strip Music 2 through the same orguINETTE that Perforated Sheet D was run through, and see if you can thereby determine the scale of the instrument?

Ans. [*The witness takes the exhibit and tries to run it through.*] I will say this—that I never used these instruments, and don't know anything about putting the paper in at all. [*Mr. Webber, a former witness, takes the instrument, and runs the Perforated Sheet D through.*] I should say that I don't perceive any regular scale in it. It seems to me that the reeds have all been changed around.

Int. 116. How would changing the reeds affect the character of the perforated strip? And state also how it would affect printed sheet music if I should write the notes that belong on one line of the staff upon another line?

Ans. The music would all have to be arranged in a different way, and the musical progression would not follow in the way they would in sheet form. If it was done in the sheet music it would be impossible for a musician to read it.

Int. 117. Please hear Defendant's Exhibit Perforated Sheet E run through the orguINETTE slowly, and see if you can tell by the sound what changes have been made in the reeds of that orguINETTE?

Ans. [*Mr. Webber runs the exhibit through as suggested in the question.*] I think they have been alternated.

Int. 118. Please look at Exhibit Perforated Sheet B, and see if you can read it?

Ans. I read it—the air—Old Hundred.

Int. 119. Please hear that put through the orguINETTE produced by the defendant, and state whether that shows any change of scale in that instrument or not?

Ans. [*Mr. Webber puts the exhibit through as suggested in the question.*] Most certainly it does.

Re-cross-examination by MR. RUSSELL.

Cross-Int. 120. As Defendant's Exhibit Perforated Sheet B was run through the orguINETTE, what tune, if any, did it play?

Ans. It didn't play any tune.

Cross-Int. 121. If the scale hadn't been changed, would it then have played it?

Ans. I think it would have played the air of Old Hundred?

Cross-Int. 122. How does the changing of the reeds in the orguINETTE affect the reading of what you call the notes from the perforated sheet?

Ans. It affects it in the same way that it would if sheet music were changed in like manner—that is, to render it unintelligible.

Cross-Int. 123. Will you hear the question again—I think you do not understand it.

Ans. The music in being arranged for the scale of the orguINETTE, if the reeds are placed regularly, it would be just the same as reading sheet music; but placed irregularly, and not knowing the scale, I was unable to read it.

Cross-Int. 124. Will you tell me how the placing of the reeds affects the reading from the perforated paper, whatever those notes may be.

Ans. If the scale of the instrument and the scale of the paper are separate and distinct scales, the reading will be separate and distinct accordingly.

Cross-Int. 125. If you take up the perforated strip and can read it from what you call the perforated notes, how is that at all affected by the placing of any reeds in the orguINETTE?

Ans. It really plays a different succession of musical tones than I sing.

Cross-Int. 126. How does that affect your reading of the notes from the perforated paper?

Ans. By changing the musical intervals.

Cross-Int. 127. If, referring to your answer to the 116th question, the music is arranged in a different way and made to progress would such music be a copy of that from which it might be taken?

Ans. As long as the tune when reproduced on the instrument sounded correct.

Cross-Int. 128. You heard Defendant's Perforated Sheet B called Old Hundred, before it was put into your hands, did you not?

Ans. Yes, sir.

GEORGE SWIFT.

Attest: WM. A. COPELAND, *Special Examiner.*

BOSTON, Jan. 6, 1886.

[Present: *Counsel as before.*]

DEPOSITION OF GEORGE B. KELLY.

Direct Examination by J. E. MAYNADIER, Esq., of Counsel for Complainants.

Int. 1. What is your name, age, residence and occupation?

Ans. George B. Kelly; 50; Jamaica Plain; cabinet organ manufacturer.

Int. 2. State generally what experience you have had in musical matters.

Ans. Since 1878 I have been engaged in making strip sheet music. I am not a musician, but I have taken great interest in music and musical instruments. In the manufacture of this strip sheet music I have been thrown into business relations with many other parties engaged in the ordinary sheet music business.

Int. 3. Please state generally the growth of the strip music business since 1878.

[*Objected to as irrelevant and incompetent.*]

Ans. It has grown very rapidly since that date. In the year 1878 the sales per month averaged about \$200. In 1883 the sales were often as large as \$6000 per month, since then it has increased largely. The number of pieces sold in each year has increased in a greater per cent. than the receipts, as the cost of production has diminished and the same amount of money represents a much larger amount of pieces of music. At the present time we are making and selling over 1,500,000 pieces in the course of a year. I meant to say tunes; that would represent 400,000 strips of music.

Int. 4. How many copies of "Cradle's Empty Baby's Gone," have you sold in strip music form?

[*Objected to as irrelevant and incompetent.*]

Ans. 18,000 up to May, 1885, and over 2,000 since then.

Int. 5. Please describe how you manufacture this strip music, taking "Cradle's Empty Baby's Gone" as an illustration, and explaining wherein the strip music is a copy of the sheet music.

Ans. We buy a copy of the ordinary sheet music and give it to one of our workmen employed for that purpose, and he copies upon a strip of paper the notes of the tune forming thereby a stencil or working plate from which duplications are made.

Int. 6. In the strip music for the fourteen note orguINETTE, are all the notes on the printed sheet music copied? If not, please explain why.

Ans. What changes are made or notes omitted is due to the small compass of the instrument.

Int. 7. How do you read a piece of music?

Ans. I am not a musician. I read it very slowly by the aid of a piano or organ. When I say read it, I mean interpret it so that I will know the melody. I might call off the notes but they would convey no idea to my mind unless I heard them on an instrument. Some people hum or whistle a piece as they read it, which is a common practice among those who can do so where they have no instrument to play it by.

Int. 8. About how many copies of "Cradle's Empty, Baby's Gone" have been usually kept in stock by your company?

Ans. Sometimes ten, sometimes a hundred, sometimes more. As our means of duplication is very good we do not carry a very large stock of each kind of music.

Int. 9. About how many copies can you produce from one stencil?

Ans. I should think about twelve hundred.

Int. 10. And what is the practice when a stencil wears out?

Ans. Copy another one from it and correct it by the original.

Int. 11. For how many kinds of musical instruments do you now arrange tunes and melodies?

Ans. Thirteen—there may be more that I overlooked, but there are thirteen in actual sale.

Int. 12. And what is the most limited, and what the most extensive scale of these thirteen?

Ans. Fourteen notes compass is the lowest number, forty-six the highest. But we have arranged music for special instruments not yet upon the market, in which the range of scale is very much greater. I can't tell how much, but very much greater.

Cross-examination by CHARLES THEO. RUSSELL, Esq., *of Counsel for Defendant.*

Cross-Int. 13. What is your relation to the plaintiffs in this suit, or either of them?

Ans. I am president of the Automatic Music Paper Co.

Cross-Int. 14. Do you have the management and charge of its general operations?

Ans. I have the general supervision, but I do not attend to any of the details of the manufacture or business.

Cross-Int. 15. How long have you been president of the company?

Ans. Since 1880.

Cross-Int. 16. Were you connected with the company before you were president?

Ans. The Automatic Music Paper Co., was organized in 1880. I was one of the organizers and was elected president at the first meeting, and have been president ever since.

Cross-Int. 17. You are entirely familiar, are you not, with its business and its manufactures?

Ans. I am.

Cross-Int. 18. What is its business and purpose as fixed by its articles of organization?

Ans. The purpose for which the company was organized, and its sole business since then, has been the manufacture of strip sheet music.

Cross-Int. 19. For what uses and purposes is the strip sheet music, as you call it, manufactured?

Ans. It is especially prepared for use on so-called automatic musical instruments.

Cross-Int. 20. What is the meaning of the term "automatic music paper" in your company's name?

Ans. We never attached much importance to the name, and it was criticized quite freely at the time it was adopted. We use that as the phrase best describing the instruments for which the strip music was especially prepared.

Cross-Int. 21. And the sole business of your corporation is the manufacture of automatic music paper, is it not?

Ans. It is.

Cross-Int. 22. And such paper is sold and used for the purpose of automatically playing by mechanism, tunes upon the instruments you have heretofore described, is it not?

Ans. It is.

Cross-Int. 23. And it is an important and essential part of the mechanism by which such tunes are played, is it not?

Ans. It is essential to that instrument as the instrument is worthless without it, but it is not a part of the mechanism any more than printed music is part of a piano or organ.

Cross-Int. 24. How is it essential to the instrument so that the instrument is worthless without it, and what function does it perform?

Ans. I said the instrument was worthless without it, because the automatic instrument generally has no keyboard by and through which the music could be rendered in any other way, but the function of this strip sheet music varies in different classes or styles of automatic instruments.

Cross-Int. 25. Is not its usual and ordinary function and purpose to traverse a plane over which it is carried by mechanical means, and in which there are reed valves, and to open each of said valves as the particular perforation in the strip passes over it?

Ans. It is.

Cross-Int. 26. What is there analogous to this in the playing of a piano by an ordinary player?

Ans. I will endeavor to answer this question as I understand it. An automatic piano in which the perforated strip is used in this way would sound to the listeners like the playing of a first-class musician. [Question re-read.] If you will allow me to explain—there were two answers came into my mind, and that one came first. All playing is in my estimation more or less mechanical. A man's fingers may be so educated as to play an air without thinking of it,—without exercising the will at all.

Cross-Int. 27. Does not the perforated sheet going through the instrument do the same thing that the player's fingers do when playing the piano?

Ans. Yes, it practically does.

Cross-Int. 28. Does it do anything else?

Ans. Not when used in that way.

Cross-Int. 29. You are the same Mr. George B. Kelly, who, on the 27th of August, 1883, as president of the company, made oath to the original bill of complainant in this case, are you not?

Ans. I am.

Cross-Int. 30. And you there stated and made oath, did you not, that all the allegations of said Automatic Music Paper Co., therein contained, I know of my own knowledge to be true, and all other allegations in said bill, I believe to be true?

Ans. I suppose so. I don't remember the wording. The bill is not before me. I cannot say any more than that.

Cross-Int. 31. Do you remember whether you also stated "I have read the said bill and know the contents thereof"?

Ans. I think so.

Cross-Int. 32. Does this original bill contain a full, fair and truthful statement of the functions, purposes, uses and modes of operation of the perforated strips of paper described?

Ans. It does not give all the functions of the strips of paper described. It gives a full and complete description of its operation in the Automatic Musical instruments.

Cross-Int. 33. As far as it undertakes and purports to state, does it state fairly and truly?

Ans. As I remember it, it gives a very full description of the working of the instrument in which the strip of paper is used for automatically playing.

Cross-Int. 34. Does it give it truthfully and fairly?

Ans. That is what I meant to say in saying fully. I thought that covered more than by saying fairly.

Cross-Int. 35. If it is stated in the amended bill of complaint that the new style—meaning the perforated strips—is adapted and intended for a use wholly different from any use possible to be made of the old style—meaning the ordinary sheet music—is such statement true?

Ans. Certainly.

Cross-Int. 36. Now look at Defendant's Exhibit Roller F with perforated strip of music on it, and state what it is.

[The roller and strip is put in evidence and marked Defendant's Exhibit Roller F, W. A. C., Spl. Exr.]

Ans. It is a strip of music similar to those we manufacture and

sell, rolled up on a roller almost exactly like ours. I can't say whether this was manufactured by us or by some one else—I should say that it was not manufactured by us, on looking again. It hasn't got our stamp or trade mark.

Cross-Int. 37. What is its purpose and function?

Ans. I have already answered as to the purpose and function of our own music. I suppose it is for the purpose and function as ours.

Cross-Int. 38. Please look at the Defendant's Exhibit G—barrel of hand-organ—and tell me what is its purpose and function in a musical instrument, and wherein, in this respect, it differs at all from the perforated strips of paper in the automatic instrument.

[*The exhibit referred to is now put in evidence.*]

Ans. I am entirely unacquainted with the construction of a hand-organ, or a barrel organ, but I know that in the production of this barrel, if, as I suppose its function is to open valves, that it is customary in the production of this barrel to copy the musical composition upon a strip of paper precisely as we do, suitable to the circumference of of the barrel I should have said—place it upon the barrel and drive these pins so that they correspond with the notes in the sheet, and if this barrel was rotated upon a strip of paper of suitable nature it would reproduce the tune as it was originally placed on the barrel.

Cross-Int. 39. Are the perforated strips ever applied to the instrument upon rollers instead of traversing it longitudinally?

Ans. I have no knowledge of any such practice.

Cross-Int. 40. Have you ever seen or read what is called the Metzger Patent?

Ans. Yes sir.

Cross-Int. 41. Doesn't that apply the perforated strips upon rollers?

Ans. It so reads in the patent.

Cross-Int. 42. And also so shown in the drawings, and in the models, is it not?

Ans. It is so shown in the drawings. The description says that paper or any other elastic substance can be used; but I have no knowledge of its being so used, as I have never seen his instrument, nor do I know that he has any on the market.

Cross-Int. 43. Has not the Metzger Patent been applied and extensively used in what is known as the Singing Doll?

Ans. Yes sir.

Cross-Int. 44. Has your company ever applied for a copyright upon any of these perforated strips?

Ans. I think so.

Cross-Int. 45. Have they ever gotten any copyright?

Ans. No sir. The answer of the Librarian was that it was an unusual form.

Cross-Int. 46. Have you ever applied for a copyright upon this perforated paper, "Cradle's Empty, Baby's Gone?"

Ans. No sir.

Cross-Int. 47. Are you familiar with the patent set forth in your amended bill as the Hunt & Bradish Patent?

Ans. I am.

Cross-Int. 48. Will you state wherein the draft No. 10, in that patent and the claim thereunder differs from the perforated strip music which you make?

Ans. I should say there was no difference.

Cross-Int. 49. And the perforated sheet therein patented, and its application, are the same, indentically, are they not, with the perforated sheets that you make?

Ans. I meant to say that the sheet draft 10, in my estimation, was a representation of the the same kind of work, or strip music, as the complainants' strip music, but the reading of the claim is ambiguous and may cover construction of sheets of which I have no knowledge.

Cross-Int. 50. I understand that you do not profess to be able to read by the eye either the sheet music or the perforated strips?

Ans. I think I have already answered this question—at least I have made a plain statement of what I can read in a previous answer, I am not what is called a good reader—a quick reader; I can play ordinary pieces on a piano or organ, but I must have an instrument of some kind to convey the sound to my ear by which I should have a knowledge of the composition.

Cross-Int. 51. Can you read by the eye without previous knowledge any of these perforated strip sheets?

Ans. I read ordinary music by previous knowledge, and reading all forms of musical notation is a question of knowledge of the characters used and of practice.

Cross-Int. 52. With your knowledge of music and practice, can you read one of these perforated sheets of which you have had no previous knowledge?

Ans. I never tried. I cannot read Tonic Sol Fa System, for the same reason, I am not a singer, and I play very little.

Cross-Int. 53. Is that the best answer that you can give me to this question?

Ans. It is.

Cross-Int. 54. What do you mean in your answer to int. 5, by "duplications"?

Ans. Making copies.

Cross-Int. 55. How, copies?

Ans. Producing other strips of strip music exactly like the original one.

Cross-Int. 56. And you mean by the original one, the one you first make, do you not, by perforation?

Ans. Yes, like the original one that we copied from the sheet music.

Cross-Int. 57. And you do not mean that you make any copy of the original sheet music, other than as the perforated strip music may be a copy, do you?

Ans. We consider every one a copy, and it is customary to try one out of every lot, as we call it, to see if it corresponds to the original sheet music.

Cross-Int. 58. [*Question repeated.*]

Ans. No, we do not reproduce it in any other form than as perforated strip music at the present time, but we have produced more or less strip music in which marks were used instead of perforations to indicate the notes.

Cross-Int. 59. Referring to your answer to the 6th int., your first process in the manufacture of perforated strips is by adapting it to the instrument, and selecting what parts of the piece are to be copied, and what are to be omitted, is it not?

Ans. It is very seldom we have to make changes in the ordinary music—simple music, such as we place on the orguINETTE. The scale or compass of the instrument is adapted to simple or common music of the day.

Cross-Int. 60. Putting out of mind how important alterations or omissions may be, do you not begin by arranging the tune for the particular instrument which it is to go through, by selecting what is to be copied, and what is to be omitted?

Ans. We do.

Cross-Int. 61. And when you have done this, you put down what is to be taken, by marks upon the stencil, do you not?

Ans. Yes.

Cross-Int. 62. And then you cut them from the stencil into the perforated paper, do you not?

Ans. Yes, practically. The stencil goes through a machine or press for the purpose of reproducing strips corresponding to the stencil.

Cross-Int. 63. And then these strips, so perforated, are compared and tested with the original music by playing, are they not?

Ans. They are tested in various ways. The common practice is to put it upon the instrument that it was designed for, and play it automatically, as that is the easiest mode of testing it, when the performer is perfectly familiar with the original piece of music; but in other cases they have to refer to the original printed sheet music and correct it thereby.

Cross-Int. 64. And when thus corrected and manufactured, it is sold or used for the purpose of playing the tune automatically upon the instrument for which it has been designed and adapted, is it not?

Ans. We suppose so; we have no means of knowing what our customers do with the paper, other than general report.

Cross-Int. 65. Do you mean to swear, as president of this company, engaged solely in the manufacture of these perforated strips, that you don't know what they are used for except by general report?

Ans. These perforated strips—or strip sheet music—are arranged for different automatic musical instruments. We sell them to the manufacturers of these instruments. We have nothing to do with the instruments, and the number that I have seen in all my years of experience is small compared with the number made.

Cross-Int. 66. What do you mean in answer to the 11th int., by the term “arranged tunes and melodies”?

Ans. We mean by that the process of copying from the original

and, in many cases, varying the harmony or other parts of the musical composition, if necessary, to adapt it to a certain instrument.

GEO. B. KELLY.

Attest :
WM. A. COPELAND,
Special Examiner.

BOSTON, January 7, 1886.

[Present: *Counsel as before.*]

DEPOSITION OF EDWIN W. BROWN.

Direct Examination by J. E. MAYNADIER, Esq., of Counsel for Complainants.

Int. 1. What is your name, age, residence and occupation?

Ans. Edwin W. Brown; 51; Boston; Solicitor of Patents, and member of the firm of Brown Brothers, Solicitors of Patents, Boston, for the last sixteen years.

Int. 2. What experience have you had in musical matters?

Ans. I have played the pianoforte since I was nine or ten years old, and since I was sixteen years old I have played the organ in church in Boston continuously until within a few years, and occasionally since. For eight or ten years previous to 1869 I was teacher of the pianoforte and organ.

Int. 3. What skill have you in reading music, and explain how you read music?

Ans. The skill acquired from a musical education and practice on the organ and piano; and I read music partly from the notes, partly from the position and general arrangement of the chords and harmony.

Int. 4. What is the signature, so called, in ordinary sheet music; and state whether you can play music with the signature omitted; what the signature has to do with the key, and generally as to the signature?

Ans. The signature is placed generally at the beginning to indicate the key in which the piece is arranged. I can play music without the signature being indicated by the usual mark or signature. The signature has to do with the key by indicating generally the key in which the music is written. Some pieces of music really have no signature by a special mark; for instance, the key of C, the absence of signature indicating the key.

Int. 5. What is the difference between the clef and the signature?

Ans. I have already explained the signature; the clef indicates the position of the letters on the staff.

Int. 6. How do you know the key of the common sheet music?

Ans. I know it, first, from the signature, of course, and also from the notes—the harmony.

Int. 7. Suppose you saw a piece of common printed sheet music without clef or signature, how would you determine the value of the staff lines and spaces?

Ans. If it was a piece written for the piano, I should know the upper staff indicated the G clef, or that G above middle C was on the second line on the staff, which is the meaning of the G clef as at present used; and I should know that the lower staff indicated the F clef, which, as used at present, indicates that F is on the fourth line of that staff, below middle C. That would give me the whole range of notes on the two staves. If only one staff was used without clef or signature, I should judge by the general arrangement of the notes on the staff, if made of chords; if merely one note, or a succession of notes indicating a solo, I should judge somewhat from that, though perhaps not so clearly. In explanation of the clefs, the G clef is called G clef as it indicates by the position of the circles at the lower part of it the line of the staff where the letter G above middle C is; and the F clef indicates the line between its two dots on which F below middle C is. In some pieces of music, although there is a signature indicated, it would not show in itself whether the piece was in a minor or a major key. In that case we should have to judge by the harmony of the musical composition, as the same signature would answer for two keys, one a major and the other a minor, with a different note for the tonic note.

Int. 8. Are you acquainted with any other systems of notation than that used in ordinary printed sheet music? If so, please explain the other systems with which you are familiar?

Ans. I know of the Tonic Sol Fa system, although not much acquainted with it; also the system commonly called perforated sheet music. I am somewhat acquainted with the general arrangement of that. I don't know that I am sufficiently well acquainted with the Tonic Sol Fa system to explain it much. I have looked at the books somewhat. The perforated music sheet, I know generally the system of its preparation and what the rows or lines of perforations indicate. Each line or row of perforations in the strip sheet indicates a certain note of the scale, the perforations themselves indicate the notes, and the length of the perforation the length of the note; the spaces between the perforations in certain places on the strip sheet indicate rests. The lines or rows of perforations on the strip sheet correspond to the lines and spaces on the staff of the printed sheet.

Int. 9. What skill have you in reading perforated strip music?

Ans. I have some, not much. I have compared it some with the printed music sheets.

Int. 10. Please compare the two pieces of music now shown you, and state wherein the strip music is copied from the sheet music; and in doing this, please compare the first measure of the sheet music with the first corresponding measure of the strip music, and then select one or two measures where you esteem them to differ most widely, and explain the reasons for those differences. The two pieces of music I refer to are Complainants' Exhibits Common Sheet and Strip Sheet.

Ans. I will say first, preparatory, that the Exhibit Common Sheet is arranged as a song with a short chorus of four parts at the end of each verse of the song, which is in two verses. The melody of the song is on a separate staff, and the accompaniment for the pianoforte, or similar keyed instrument, is arranged below the song staff. The compass of the scale indicated by the two staves for the piano is from the second F below middle C up to and including the second G above middle C, making the diatonic scale in this common sheet of the key of C, comprising twenty-three notes, with the leger line of middle C. The staff on which the song is written is merely a duplication of the

upper staff of the staves for the piano, and could be dispensed with, the notes of the song being written instead on the upper staff of the piano staves. In the Exhibit Strip Sheet the scale indicated by its lines or rows of perforations consists of the diatonic scale of C, including in its compass thirteen notes, and extends from G below middle C to second E above middle C, with a line or row of perforations for F sharp, or sharp fourth of the scale of C, making the whole scale as indicated by the lines or rows of perforations on Exhibit Strip Sheet, of fourteen notes. The music, as arranged on common sheet, has a bass note on the lower staff and chords on the upper staff of the piano staves, the bass notes, as a general thing, being below the compass of the scale in Exhibit Strip Sheet. In order to arrange the music that is on the common sheet in the strip sheet form, the notes necessarily have had to be put nearer together, and at the same time preserve the harmony in the limited space as nearly as the strip sheet scale will allow. The melody of the song is nearly as printed on the common sheet, with a few changes in the notes to bring it within the compass of the scale of the strip sheet, and also where one or two accidental sharps occur in the melody for which there is no line or row of perforations on the strip sheet. This will briefly explain why it is necessary to change some of the notes, more especially the harmony, in order to arrange it on Exhibit Strip Sheet. The Exhibit Strip Sheet commences at the measure where the song commences on Exhibit Common Sheet, and this measure I will call the first measure. The melody on strip sheet in the first measure is the same as indicated on the common sheet, first measure. The bass notes or lower notes, are the same letter, but placed an octave higher. The upper note of the first chord in the strip sheet in this measure is represented as an octave higher than the lowest note in the first chord in the common sheet, and is intended for the same note, making the common chord of C. In the second chord of common sheet, the same change is made in the same G for the strip sheet, and two notes of the chord, B and D, are left out in the strip sheet because, I should judge, the bringing of the four notes so near together as they would have to be in the strip sheet, would make it very discordant when sounded, and if the B was made in the strip sheet, it would alter the bass note which should be C. The third and fourth chords in the strip sheet

DEPOSITION OF EDWIN W. BROWN.

are arranged as the first chord is, except that the upper note, or G, is part of the chord, and also the note forming the melody. In the second measure in the strip sheet, the second bass note is changed from C to A, an octave higher;—I should judge in order to introduce the A note in the chord which is in the common sheet, and thus preserve the harmony; if arranged otherwise on the sheet, it would interfere with the melody somewhat. This change is the fancy of the party who arranged it. It is correct enough otherwise. The melody in the second measure in the strip sheet is the same notes and the same length as in the common sheet. There is quite a change in the third measure of the strip sheet—the bass more particularly—from the third measure in the common sheet, the notes which are of the same name as the bass notes, being placed in the middle of the sheet because of the limited scale of the strip sheet, these notes being F and D on the common sheet, and below the scale of the strip sheet, the lowest notes in this measure on the strip sheet being in unison with the melody. There are similar changes of the notes in most of the measures of the strip sheet which are intended for the harmony more particularly, independent of the bass notes, in order to make the chords like the common sheet; because of the limited scale of the strip sheet, but the chords are the same. The chords of the strip sheet for the third, fourth and fifth measures on page four of the common sheet, are arranged substantially as full chords for each beat of each measure; whereas on the common sheet, the bass notes and chords are alternately arranged so that on the first and third beats of each of these measures, only the bass note is written, and the chord on the second and fourth beats of each of these measures. The melody, in some instances, is written on F, which is a note above the scale of the strip sheet, and in order to have a melody note on the strip sheet for this F, some note common to the chord has been taken for the melody—for instance, in the first measure on page four, the note in the common sheet is F, and as this note is above the scale of the strip sheet, it has been changed in the strip sheet and made D; also the last note in the melody in the common sheet of the third measure, page four, is D sharp, and as there is no D sharp in the strip sheet scale, the note is changed to G below. There are several other changes in the melody notes for the same reason. [Adjourned.]

BOSTON, Jan. 8, 1886.

[Present: *Counsel as before.*]

Int. 11. Have you prepared copies of certain measures from Exhibit Common Sheet and from Exhibit Strip Sheet? If so, please produce them and explain them.

Ans. I have and here produce them. [*The copies are now put in evidence, one sheet containing the 1st and 2d measure, marked Complainants' Exhibit 1st and 2d measures; the 2d sheet containing the 7th and 9th measures, marked Complainants' Exhibit 7th and 9th measures; and the 3d sheet containing the 10th measure, marked Complainants' Exhibit 10th measure, W. A. C., Spl. Ex'r.*] The figures represent the 1st, 2d, 7th, 9th and 10th measures of the common sheet and the strip sheet. The continuous horizontal lines of each figure represent the lines of the two staves of the instrumental part of the song, with a line between the two for middle C. Between these continuous lines there are dotted lines parallel therewith. The dotted lines from the G below middle C, up to and including the dotted line second E above middle C, and the continuous lines, represent the lines or rows of perforations on the strip sheet. Between the 1st line marked E above middle C and the next line marked G is a dotted line for the F sharp of the perforated strip. The notes on the first half before the break in the several lines are the same as on the common sheet in its respective measure, and the notes on the last half after the break in the lines represent the same measures on the strip sheet, and the several figures are intended to represent a line for each note of the scale instead of the usual form of lines and the spaces between.

Int. 12. I observe in your copy of the second measure from the strip sheet a half note on the staff line G above middle C, while the note in the same measure in Exhibit Common Sheet, is a dotted quarter. State whether that half note is musically correct or not, and how that note is in the complainants' strip music, and in the other strip music copies of Cradle's Empty, Baby's Gone? The Exhibits referred to are Exhibits Strip Music 2, 3 and 4, also four other strips now put

DEPOSITION OF EDWIN W. BROWN.

in evidence and marked Complainants' Exhibits Strip Music 5, 6, 7 and 8.

Ans. It is musically correct in connection with the other notes of the melody, completing the measure. They are all the same as Exhibit Strip Sheet. This note on the strip sheets represents a half note in length, more than a dotted quarter, and that is the reason it is so written on the Exhibit 2d Measure, (strip sheet). The same note in the Exhibit Common Sheet is a dotted quarter with an eight rest after it to fill out the measure. I suppose it is shortened in the Common Sheet on account of the words of the song, and lengthened in the strip sheet to make the melody more continuous.

Int. 13. Please look at the roll now shown you, marked Complainants' Exhibit Strip Ordinary Notation, W. A. C. Spl. Exr., and state what it is and who made it.

[*The exhibit referred to is now put in evidence.*]

[*Objected to as irrelevant and unimportant, and also to the form of the question.*]

Ans. I laid it out and my draftsman finished it—inked it up. It represents the first eight measures of the Common Sheet and Strip Sheet. The horizontal lines and spaces between the lines represent the lines or rows of perforations on the strip sheet, and the notes correspond to the notes or perforations in Strip Sheet; at the beginning is placed the G clef indicating where G is, with an additional mark representing common time. The lines and spaces are the same relative distance from each other that the lines or rows of perforations in the strip sheet are.

[*Adjourned.*]

BOSTON, Jan. 11, 1886.

[*Present: Counsel as before.*]

Cross-Examination by CHAS. THEO. RUSSELL, Esq., *of Counsel for Defendant.*

Cross-Int. 14. You have attended all the hearings in this case, have you not?

Ans. I have except a short time when each of the witnesses was giving his testimony.

Cross-Int. 15. I mean hearings in court?

Ans. I have.

Cross-Int. 16. You have heard or read all the testimony that has been given in the case I suppose?

Ans. Substantially all, I have read all of Mr. Webber's testimony, but only a part of Mr. Swift's and a part of Mr. Daggett's.

Cross-Int. 17. You have assisted in the preparation of the case I suppose, and have been retained as solicitor and expert, have you not?

Ans. I have.

Cross-Int. 18. Have you had a diagram or explanation of the perforated strip furnished to you prior to your making a comparison between the printed and perforated sheet?

Ans. I have. I had the scale of the sheet given to me. My general knowledge of perforated music sheets extends farther back than this special case.

Cross-Int. 19. Does not the scale in music correspond substantially to the alphabet in printing?

Ans. The alphabet is used to give the name or letter to the notes of the scale.

Cross-Int. 20. What I mean is, does not the scale in music bear the same relation to the tune that letters in the alphabet do to words in print?

Ans. I should not think so, fully, for the letters in words in print are sounded; the letters in music are not sounded.

Cross-Int. 21. Is the scale an important and essential part of the musical composition?

Ans. It is.

Cross-Int. 22. Is the signature generally an important part of a musical composition?

Ans. As music is published now-a-days it is, although not absolutely necessary as a special mark. It is more convenient to have it.

Cross-Int. 23. What is the use and purpose of the signature?

Ans. To indicate the key in which the piece is written; that is, it indicates what letters are sharped or flatted throughout the piece unless otherwise changed by an accidental sharp or flat, or natural.

Cross-Int. 24. Is not then the signature, or something equivalent to it, an absolute essential in every piece of musical composition?

DEPOSITION OF EDWIN W. BROWN.

Ans. I should say yes, but it is not an absolute necessity to have it as generally used now-a-days, because it can be left out at the usual place and each note intended to be sharped or flatted for the key can be made so as it occurs during the piece.

Cross-Int. 25. Then the difference is in using the signature in the usual form and distributing it through the piece by the flats and sharps, is it not?

Ans. Substantially so where sharps and flats are used?

Cross-Int. 26. What is the usual and ordinary mode of indicating the key?

Ans. By one or more sharps or flats placed at the beginning of the piece except in the key of C, which, being the natural key, would have none.

Cross-Int. 27. One or more sharps or flats would be the signature, would it not?

Ans. If placed at the beginning of the piece.

Cross-Int. 28. It is essential to know the key in order to play the piece, is it not?

Ans. It is.

Cross-Int. 29. Are there any flats or sharps in the perforated strips?

Ans. There is no special mark for the sharp, except there is a line or row of perforations for the sharp or flat used in the scale represented by the perforated music sheet according as that scale is more or less full and complete.

Cross-Int. 30. Then there is nothing on the perforated sheet, is there, to indicate the key?

Ans. Nothing but the lines or rows of perforations.

Cross-Int. 31. How do they indicate it?

Ans. The general arrangement of the perforations might indicate the key, but they would not necessarily indicate the pitch.

Cross-Int. 32. Can you take a perforated paper sheet and from it, without anything else, give the pitch or key of the tune it plays upon the orguINETTE?

Ans. I couldn't give the pitch because the orguINETTE might be tuned to a different pitch—as for instance, I have called the scale on the Exhibit Strip Sheet as the scale of C, as run through the orgui-

nette the tune would be played in the key of D, as that is the scale of the reeds of the orguINETTE; therefore I could not give the pitch. The scale of the reeds in the instrument is the same as the scale represented in the Exhibit Strip Sheet; that is, the notes are the same relative distance from each other.

Cross-Int. 33. I think you do not appreciate my question. What I mean is, taking one of these perforated strip sheets by itself alone, without knowing the instrument upon which it is to be played, or the tune it is to play, can you from such perforated paper alone, tell either the pitch or the key of the tune?

Ans. Do you mean the piece from which the strip sheet was specially arranged?

[*Counsel replies, I do as to the pitch or key.*]

I might not tell the exact key and pitch from which the piece was arranged, although I might approximately, judging from the width of the perforated strip and the number of rows of perforations.

Cross-Int. 34. What is there, then, on the perforated strip, independent and exclusive of everything else, to indicate the pitch or key of the tune?

Ans. I don't see how I could take it independent of everything else any more than I could the signature for a composition for the pianoforte, as the signature for the composition for the pianoforte, independent of the staff and other portions, would practically indicate nothing, except, as there is a certain general arrangement of flats and sharps for the signature of each key; if seen alone it would suggest to me such key.

Cross-Int. 35. Can you not take the ordinary musical composition, entire, and from it, independent of all other sources, give its pitch and key? I mean just as it is published, of course.

Ans. I can.

Cross-Int. 36. Can you take the perforated strip in its entirety, and, independent and exclusive of everything else but what is in the perforated sheet, and tell its pitch or key?

Ans. As I said before, I don't know that I can exactly, but judging somewhat from the arrangement of the notes, the number of the lines or rows of perforations representing the scale, I might approximately.

DEPOSITION OF EDWIN W. BROWN.

Cross-Int. 37. Will you please look at Defendant's Exhibit Roller F, and see if you can give the pitch or key of any music it may represent?

Ans. I could not tell the key of the piece from which this was taken, but should judge that it was either C or D. It could be in either one very well. If I was to change it to common music sheet form, I think I should place it in one or the other, as best adapted for it. It could be played—or the notes could be played—in any key near to C or D and answer as well.

Cross-Int. 38. There is nothing on the perforated sheet shown you, is there, from which you can tell whether its key is C or D, or neither of them?

Ans. No, except as I have stated before.

Cross-Int. 39. You have compared in your examination in chief the perforated sheet and the music sheet of Cradle's Empty, Baby's Gone. Now will you please tell me if there are not 29 staves, 145 lines, 174 spaces, 28 measures, 8 braces, 23 bars, 3 double bars, several notes, 131 dots, adding to the value of the notes, 29 clefs, two kinds of clefs, G and F, 1 sign of time, 5 slurs, 9 ties, 18 characters representing expression, 25 rests, two kinds of rests, 21 accidental sharps and 7 naturals in the published musical composition which are not in or represented in the perforated paper with which you have compared it.

Ans. In the common sheet there is an introduction which takes two of the twenty-nine staves which is not on the strip sheet. The staves, as printed on the common sheet, are practically one, except that in the song portion three staves are combined as one, and in the chorus six as one. In the strip sheet it is all one staff, and practically the same thing, as the common sheet could be written out in one long staff with the three together in the song and the six in the chorus. In the strip sheet, making it in one long staff, obviously reduces the number of lines, and as the strip sheet is on a limited scale compared to the scale on the common sheet, the number of lines is still further reduced. The same answer applies to the spaces as to the lines, as the lines on the strip sheet represent the lines and spaces on the common sheet. There are 24 measures represented on the strip sheet by the arrangement of the perforations, the first four measures of the

common sheet not being arranged on the strip sheet. There are no braces, as it is all on one staff, and in such a case with the same notes on the common sheet as represented on the strip sheet there would be no brace either, as the brace is usually used on the common sheet to connect two or more staves together. There is no mark for the bar, no double bars, except as indicated by the notes at the end of the strain or the piece. There are notes in the form of perforations, which perforations being of different lengths indicate notes of different lengths. The dots are indicated in the same way by lengthening the perforation to give the length of the note. There is no mark of the clef, and in the common sheet, if printed in one long staff, it would reduce the number of clefs. The arrangement of the notes on the strip sheet would indicate the time. There are no slurs; and there are no ties, except the notes on the strip sheet are lengthened to give the length of the note made by the tie on the common sheet. There are no characters representing expression. The rests in the strip sheet are made or represented by the portion of the paper between the perforations or notes. There are one or two rests left out in the strip sheet, the note being made longer, as I have pointed out in my direct testimony—as for instance, in the second measure. There are no accidental sharps in the strip sheet, but there is a separate line or row of perforations for the accidental F sharp. The other accidental sharps, on account of the limited scale of the strip sheet, are not provided for. There are no naturals, except that every line or row of perforations in the strip sheet is a natural except the F sharp, calling the strip sheet in the key of C, as I have stated before.

Cross-Int. 40. Taking then your answer to the last question, the perforations in the perforated sheet indicate in most, if not in all cases, something more than the simple notes in the music sheet, don't they?

Ans. Not the perforation itself, but in their relative positions one to the other, the same thing as the notes on a common sheet would indicate.

Cross-Int. 41. As expressed in your answer last but one, does not the perforation in the perforated sheet by its length or size, independent of its position, indicate something more than the simple printed notes in the music sheet?

DEPOSITION OF EDWIN W. BROWN.

Ans. Not if the printed notes in the common sheet were printed on a strip by themselves in the same relative positions. The perforation in itself, by its length and its size, would not indicate any more than the printed note on the common sheet.

Cross-Int. 42. Is there any expression whatever in the perforated paper except that made by the perforations, and if so, what?

Ans. There is none.

Cross-Int. 43. Is there anything in the perforated paper that is strictly and literally a copy of anything in the printed sheet? In answering this question you will please exclude all idea of indication or correspondence.

Ans. I don't see how I can exclude indication or correspondence in comparing the strip sheet with the common sheet. The characters on the common sheet represent, to anyone familiar with them, a certain musical composition. The characters on the strip sheet indicate the same to a person who is familiar or understands the characters on each. A person not familiar or understanding either, of course, would understand neither. I think anyone understanding the musical characters represented in a musical composition would have some idea from the general arrangement of the perforations on the strip sheet that it represented a musical composition without any special knowledge of the strip sheet.

Cross-Int. 44. Now, excluding from your mind all idea of indication or representation in either the musical composition or the perforated paper, what is there in the latter that is copied from the former?

Ans. With this exclusion, I should say nothing except that the relative heights or relative location of the perforations in the strip sheet would indicate some similarity between it and the common sheet, more especially the melody than the harmony; but if the strip sheet were represented on as full and complete a scale as the common sheet, the bass and harmony, or the accompaniment, might indicate a similarity. This answer is given supposing that I knew nothing of music whatever.

Cross-Int. 45. What is there on the perforated paper simply, without anything else, to show that it indicates or represents music rather than a pattern card, or anything else for which perforations are made?

Ans. Nothing to a person entirely unacquainted with music in any form.

Cross-Int. 46. What is there to a person ordinarily acquainted with music?

Ans. To a person not acquainted with the strip form, who was familiar with music, the general arrangement or position of the perforations on the strip.

Cross-Int. 47. And that is all, is it not?

Ans. Substantially.

Cross-Int. 48. Is not musical notation a well established and well known system?

Ans. It is.

Cross-Int. 49. Is not the composition Cradle's Empty, Baby's Gone, published in that well-known musical notation?

Ans. It is.

Cross-Int. 50. Is that well-known and recognized musical notation in the perforated papers?

Ans. To a partial degree; the perforated paper being another form of musical notation.

Cross-Int. 51. Then the usual and ordinary form of musical notation is not in the perforated paper, is it?

Ans. It is not, except in the way that I have previously stated.

[Noon recess.]

Cross-Int. 52. In the diagrams which you presented at the close of your examination in chief giving certain measures, &c., you transferred as near as you could the music represented or indicated in the perforated sheet referred to, did you not?

Ans. I did.

Cross-Int. 53. And you put it in the diagrams in the ordinary musical notation, did you not?

Ans. I did.

Cross-Int. 54. Could those diagrams as so made, without further change, or alteration or addition, be used to supersede the ordinary use and sale of the original musical composition?

Ans. The diagrams do not represent a complete musical composition. They could so far as each measure is represented by the diagram, except there are no words on the diagrams.

DEPOSITION OF EDWIN W. BROWN.

Cross-Int. 55. Suppose the whole tune, as far as it is carried through the orguINETTE by the perforated paper to be transferred or indicated by a diagram, putting into it nothing except what is in the perforated paper, do you think anybody would buy it or use it in place of the original composition?

Ans. If the original composition was published and printed in the same limited scale that the perforated sheet is, I should say, yes. The perforated sheet or strip is adapted for an instrument of thirteen notes in the scale, with an additional note for F sharp or the sharp fourth of the scale, and if a small instrument similar to the pianoforte, with only those notes or keys in it were used, the musical composition would be arranged to suit that limited instrument, and would then only have the same scale as the strip sheet.

Cross-Int. 56. Why would any musician use the diagram so made from the perforated paper instead of the original composition?

Ans. The diagram made from the perforated strip and the original composition would be the same, and a person could use either the one or the other as he pleased, supposing the original composition to be the one I refer to in my last answer.

Cross-Int. 57. Do you mean to say that a diagram made in the ordinary, usual musical notation and copied literally and strictly from the perforated paper and indicating nothing but what is distinctively expressed in the perforated paper, would be the same as the original musical composition?

Ans. That would depend on what was on the original musical composition. If it were merely the notes, it would be the same?

Cross-Int. 58. Why cannot the perforated paper, then, be read as to its notes and melody just as well by any ordinary musician as the original musical composition?

Ans. Because it is another form of notation. He has to be as familiar with that as the old form. I think some musicians could read the perforated or strip sheet form much better than others; and in fact, there are many musicians that find it difficult to read the ordinary musical notation, at first sight more particularly.

Cross-Int. 59. What difficulty does the form of notation create?

Ans. A different character represents the same note.

Cross-Int. 60. Why is that different character used in the perforated paper?

Ans. I suppose for the use for which it is intended.

Cross-Int. 61. For which what is intended?

Ans. For which the perforated paper is to be used.

Cross-Int. 62. For what purpose is the perforated paper made to be used?

Ans. The perforated paper—Exhibit Strip Sheet—is intended to be used for an instrument commonly called an orguINETTE?

Cross-Int. 63. How used?

Ans. By running it through the orguINETTE over a series of openings leading to the reeds in the instrument and operating the bellows to cause each reed to be sounded as a perforation in the strip comes over its respective opening.

Cross-Int. 64. And this is the exclusive purpose for which it is made, is it not?

Ans. Well, I should say not wholly. I should say it is made to sell; the use of it is principally with the orguINETTE.

Cross-Int. 65. And it is made to sell for exclusive use upon the orguINETTE or some similar instrument in a similar way, is it not?

Ans. I should think so.

Cross-Int. 66. It is called in the trade, is it not, automatic music paper?

Ans. I don't know as I know what it is called in the trade. My impression is that it is perforated music sheets. That is the name generally given in all patents taken out for it, and the instruments used in connection with it.

Cross-Int. 67. The name of the plaintiff corporation in this case is the Automatic Music Paper Company, is it not?

Ans. It is.

Cross-Int. 68. And their sole or general business is the manufacture and sale of these perforated papers, is it not?

Ans. It is.

Cross-Int. 69. What do you understand by the term "automatic music paper"?

Ans. I don't see how the music paper can be automatic in itself. The instrument for which the music paper is intended is arranged to play the tune automatically from the turning of a crank or any other motive force.

DEPOSITION OF EDWIN W. BROWN.

Cross-Int. 70. And the turning of the crank or the application of other motive force, causes these perforated papers, or automatic music papers, to traverse the instrument and open the reeds, as you have described, does it not?

Ans. It does.

Cross-Int. 71. And in so traversing in the orguINETTE they are unwound from one roller and wound upon another, are they not?

Ans. I do not think they are in the orguINETTE. They are in some of the mechanical musical instruments.

Cross-Int. 72. And when not fed from the roller, the perforated paper traverses the instrument longitudinally from end to end, does it not?

Ans. It does the same whether unrolled or fed in strip form.

Cross-Int. 73. When wound upon a roller, the perforated paper does not differ in function and purpose from the barrel of the hand-organ, does it?

Ans. When unwound from the roller and passed through the instrument, it is the same as the barrel of the hand-organ.

Cross-Int. 74. And the expression and marking of the music upon the barrel of the barrel-organ differs from that of the perforated papers only in that the one is made by projections upon the barrel, and the other by perforations in the paper. Is it not so?

Ans. The projections on the barrel are the equivalent of the perforations in the paper. In the perforated strip there are two forms of operation of the instrument, one of which is commonly called "paper as a valve" where the air passes through the perforations; and in another form the perforated strip acts upon keys opening the valves to the reeds substantially as the projections upon the barrel.

Cross-Int. 75. Have you ever known any of these perforated papers to be made or sold for any other practical purpose or use than automatically to play the tune upon the automatic instrument?

Ans. I think they are only made and sold to be used with these instruments.

Cross-Int. 76. They are not then intended, are they, to be read like sheet music, or to be used in playing such music by the eye and skill of the musician upon an ordinary instrument?

Ans. I think they are intended to be used principally with the mechanical instrument.

Ans. I suppose for the use for which it is intended.

Cross-Int. 61. For which what is intended?

Ans. For which the perforated paper is to be used.

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Ans. I think they are only made and sold to be used with these instruments.

Cross-Int. 76. They are not then intended, are they, to be read like sheet music, or to be used in playing such music by the eye and skill of the musician upon an ordinary instrument?

Ans. I think they are intended to be used principally with the mechanical instrument.

Cross-Int. 77. Would not their limited scale, their necessarily longitudinal form, and length alone prevent their practical use for any other purpose?

Ans. Although this Exhibit Strip Sheet is made on a limited scale, there are other strip sheets that are made on a full and complete scale, namely, the chromatic scale, about fifty notes. This would obviate the objection to the limited scale, as on such a scale most musical compositions could be arranged or copied exactly from the original musical composition. No doubt the long sheet form would be objectionable to anybody playing the piano or other similar instrument, without it was arranged to travel mechanically before the player.

Cross-Int. 78. And for the purposes for which they are made and sold, these perforated papers cannot be arranged except upon a single staff and longitudinally as they appear in the exhibits, can they?

Ans. That would be the only practical way. They have been made in sections connected together, adapted to be folded, and in such form they might be well adapted for use on the piano, turning over each section in a similar way to turning over the leaves.

Cross-Int. 79. But they must be arranged in all cases on a single staff, must they not?

Ans. Yes.

Cross-Int. 80. And when they traverse by mechanical means over the reeds in the instrument for which they are used, they do the same thing in substance that the player's fingers do when they traverse the keys of the piano, do they not?

Ans. Substantially the same.

Cross-Int. 81. And when in the diagram for the key board that has been exhibited here which traverses the keys of the piano and tells the player mechanically what key to touch and how long, the same use, purpose and function is obtained through the fingers of the player, are they not?

Ans. So far as I understand the question, I should say substantially the same.

Cross-Int. 82. In the Hunt & Bradish Patent referred to in the amended bill, is not this perforated paper, in its form, use or application, patented as a then new and original invention?

Ans. As I remember it, I think it claims the application of the per-

DEPOSITION OF EDWIN W. BROWN.

forated music sheet; but I think it was old at the time that patent was issued.

Cross-Int. 83. Will you refer to your answer to question 7 and tell me how you would determine the supposition in that answer, "that a piece was written for the piano."

Ans. Because all piano music at the present time is written upon two staves, the upper one the treble or G clef staff, and the lower one the bass or F clef staff.

Cross-Int. 84. Doesn't the tenor sometimes appear above the soprano and alto?

Ans. I should say no, generally.

Cross-Int. 85. If it does so appear, in the absence of the clef, how would you know how to produce it?

Ans. Do you mean play it? [*Counsel says, yes.*] If it was written so, it would be more intended to be sung than to be played by an instrument. It is never written on the same staff above the soprano and alto; and if placed on a separate staff above the soprano and alto, as I said before, it is intended to be sung, as a solo, for instance. In writing a psalm tune, if placed upon two staves, the soprano and alto would be on the upper one, and the bass on the lower one, and the tenor also on the lower one, except in some instances the tenor might be written for some of the high notes on the upper staff; but in all cases the four parts—bass, alto, tenor and soprano—would be written in the same relative position to each other; the bass lowest, the tenor next, the alto next, and the soprano highest. Sometimes in four part or psalm tunes the tenor might be higher than the alto, and in such case the stems of the notes would indicate to which part it belonged, by extending downward from the solid part of the note. Some four part music is written with the bass on the lower or F clef staff, the alto and soprano on the next staff above, and the tenor placed on a staff above the whole, which is more for convenience of the singers. In these ways, the tenor might sometimes be written above the soprano and alto.

Cross-Int. 86. When you speak of notes in the perforated paper, you mean the perforations, do you not?

Ans. I do.

Cross-Int. 87. Did not the Hunt & Bradish Patent recognize the perforated sheet as a part of the invention?

Ans. I think so.

Cross-Int. 88. Does not the third of the chord in the printed sheet Exhibit Common Sheet determine whether the piece is major or minor?

Ans. As I look at the chords on the sheet and know the key, I know that the piece is major; but if I could not see the signature, the third would not indicate whether it is major or minor. I should tell it by another interval, namely, the seventh; for instance by illustration with this same piece. We will suppose that this piece, "Cradle's Empty, Baby's Gone," is written in C minor. The signature then would be in three flats. If the signature was hid from me, and I knew nothing of the piece previously, I would look to see how the note B was written; and if I found a natural before it, I would judge that the piece was in the key of C minor, as the chords of the piece show also to me that they are the common chords of the key of C. A minor third is a half tone less than a major third. If there was no signature and this piece had a flat before the several E notes, I should judge by that it was written in the key of C minor.

[*Adjourned.*]

BOSTON, Jan. 12th, 1886.

[*Present: Counsel as before.*]

Cross-Int. 89. How is the scale indicated in the perforated sheet?

Ans. There is no special mark to indicate the scale, and I judge the scale from the number of lines or rows of perforations and partly from my general knowledge of music, knowing what notes would be necessary to play a tune on a limited scale similar to Exhibit Strip Sheet, in one or two keys.

Cross-Int. 90. I do not mean how you ascertain a scale, but what there is on the perforated paper to indicate the scale by inspection.

Ans. Nothing but the lines or rows of perforations, one above the other.

Cross-Int. 91. Is not the progression of the perforated sheet changed from the printed sheet?

Ans. I don't know as I understand the question.

Cross-Int. 92. What is the name of the harmony in which the printed sheet Cradles's Empty is written?

Ans. Do you mean each chord? I don't understand the question.

DEPOSITION OF EDWIN W. BROWN.

I can give you the name of each chord if you wish. The chords represent the harmony.

Cross-Int. 93. Is there no general name for the harmony?

Ans. The only general name that I know of is the word harmony.

Cross-Int. 94. Is not the perforated paper a valve sheet, admitting air by its perforated part and excluding air by its unperforated part from the reeds?

Ans. It is used so on some of the instruments; and on such instruments it is commonly called "paper as a valve".

Cross-Int. 95. Does not the perforated paper perform an act as part of a machine to produce a tune substantially as the drum of a barrel organ does?

Ans. It does substantially when it operates on keys that open a valve, except that in a barrel organ the valves are all closed and opened directly by the projection on the barrel, operating on a key connected with the valve; whereas in the paper sheet the valves are held closed by the unperforated portion of the paper pressing on the keys and as a perforation comes over its respective key it allows the key to rise or fall by the action of a spring which opens the valve.

Cross-Int. 96. The unperforated part of the paper perform the same function, do they not, as the unprojected parts on the barrel of the organ?

Ans. Not exactly, as the unprojected part has no effect on the action of the barrel organ, while the unperforated part of the paper sheet bears directly on the keys to keep the valves closed.

Cross-Int. 97. Now suppose the notes of the printed sheet were only transferred to the perforated sheet in the usual musical notation, instead of the paper being perforated, would the paper with the notes so transferred be of any use in the orguINETTE or other similar instrument?

Ans. It would be of no use in the orguINETTE, so-called, but it could be used in a similar instrument, adapted to be played by electricity, if the notes were printed in metallic ink.

Cross-Int. 98. Then the whole use of these perforated papers depends upon the perforations, does it not?

Ans. It does in the orguINETTE.

Cross-Int. 99. The ordinary printed sheet of music conveys to the

mind of the player what he must do, in order to play the tune, does it not?

Ans. It does.

Cross-Int. 100. Why in the ordinary printed sheet of music are the lines and spaces divided into staves, instead of a continuous series of lines and spaces?

Ans. Because it is more convenient to read the music.

Cross-Int. 101. Must not the key in every instance be determined before you can play a musical composition?

Ans. Certainly.

Cross-Int. 102. You say the spaces between the perforations on the perforated paper represent rests, will you please explain what you mean?

Ans. The perforations indicate the notes and if played on the instrument the notes would only be sounded the length of the perforation, there being no sound of the instrument at the unperforated part; the same way if reading it to play on the instrument, I should play the notes according to the length of the perforations, and rest between. I do not mean that every part of the unperforated portion of the paper represents a rest, except in the instrument, because no notes would be sounded; but there are parts of the perforated sheet where the unperforated portion represents more clearly the rest and that would be, as an illustration, at the end of the eighth measure on Exhibit Strip Sheet, where it shows clearly a rest.

Cross-Int. 103. Will you please look at Defendant's Exhibit Roller F, and state whether every space between the perforations in this roll represents rests?

Ans. It does not, because that exhibit is adapted for another kind of an instrument, commonly called pneumatic. The perforations there, although made in a series, would be sounded on the instrument as one note.

Cross-Int. 104. Whether then, and to what extent the spaces represent rests, depends upon the instrument for which the perforated paper has been adapted and prepared, does it not?

Ans. Somewhat so. In the Exhibit Strip Sheet the note is represented by one perforation, and its length by the length of the perforation; whereas, in Defendant's Exhibit Roller F, the note is represented

DEPOSITION OF EDWIN W. BROWN.

by a series of small perforations, and its length by the number of perforations in the series, practically the same thing.

Cross-Int. 105. How do you determine a measure in the perforated paper alone?

Ans. By the general arrangement of the perforations.

Cross-Int. 106. Does not the fact that an accidental, by making an absolutely different position on the perforated paper, destroy the similarity that might otherwise exist between the printed sheet and the perforated paper, and thereby make it impossible for a musical man to read it without learning an actually new staff?

Ans. I think if there was another staff entirely dissimilar to the present staff used in musical composition, of course a person would have to learn that staff in order to know how to read music thereon; but after learning the staff, as well as the former one, I don't see why he could not read the one as well as the other; and the tune would be the same tune whether sung or played from either staff. There are various forms of staves which have been used and suggested. Of course for a person to read on all the various forms he must know them all. The present one used in musical compositions, and the manner of arranging the notes thereon, is probably the most convenient for use.

Cross-Int. 107. [*Question repeated.*]

Ans. Of course a person would have to know what the extra line for the accidental meant.

Cross-Int. 108. I shall have to repeat that question once more.

[*Question repeated.*]

Ans. As I said before, if it is a new staff, a person would have to be acquainted with it to read the music from it, whether the change was small or great between that and the old.

Cross-Int. 109. And this is as definitely as you can answer this question, is it?

Ans. I think it is.

Cross-Int. 110. Does the natural really change the position of the letter, or does it merely indicate to the mind that the pitch of that line must be changed?

Ans. It does not change the position of the letter on the staff, but it indicates that the pitch of the note must be changed from what it would be if the natural was not before it.

EVIDENCE FOR COMPLAINANTS.

Cross-Int. 111. How is this accomplished in the perforated paper?

Ans. There is no natural on the perforated paper, except, taking Exhibit Strip Sheet as being in the key of C, the lines or rows of perforations would represent the natural notes of the key of C, except the line or row of perforations intended for F sharp.

Cross-Int. 112. While the clef locates a certain pitch on certain lines, these lines can be changed by a natural, flat or sharp, can they not?

Ans. The notes on the lines can be so changed.

Cross-Int. 113. Is there any way to so change the pitch on the perforated paper?

Ans. There is no way indicated on the perforated paper, except, knowing the scale, you can play it in any key or pitch you please.

Cross-Int. 114. Give the literal appearance of a sixteenth note in the printed sheet and on the perforated paper.

Ans. The second note in the first measure on the Exhibit Common Sheet, or printed sheet, where the song commences, is a sixteenth note. The second note in the melody on Exhibit Strip Sheet, and all others of a corresponding size, represent a sixteenth note.

Cross-Int. 115. By "second note" on the perforated paper, you mean the second perforation, do you not?

Ans. I do.

Cross-Int. 116. You have said the lines on the perforated paper correspond to the lines on the printed sheet. What do you mean by this?

Ans. The horizontal lines or rows of perforations on the strip sheet correspond to the lines and spaces on the common sheet.

Cross-Int. 117. It would not be possible, would it, to use the original sheet music for the purposes and in the way that the perforated papers are used?

Ans. I think I have answered that before. It could be used by printing the notes in metallic ink and operating the instrument through electricity.

Cross-Int. 118. Are not the leger lines one reason for dividing the lines into staves, as well as the convenience of reading?

Ans. The use of the leger lines enables the staff to be formed of a less number of lines than it would be if formed of a sufficient number of lines to take in the entire scale of the instrument.

DEPOSITION OF EDWIN W. BROWN.

Cross-Int. 119. With what facility could you read music in the absence of these divisions?

Ans. The leger lines would have no effect on any music written in the compass of the two staves. Of course, for notes above or below the staff, it is much more convenient to use the leger lines than long continuous lines.

Cross-Int. 120. Suppose a simple *fac simile* sheet were printed of only what appears to the eye on the perforated paper and in the precise form in which it there appears, would it be saleable as a substitute for the original published musical composition?

Ans. I think I should prefer the original published sheet?

Cross-Int. 121. And that is as definite as you can answer the question, is it?

Ans. It might in a certain degree be saleable as a substitute for the original musical composition. I do not think the sale of it, to be used in the same manner that the original published musical composition is used, would be so extensive, and would probably be limited.

Cross-Int. 122. Are you familiar with the original bill in this case, and did you assist in preparing it?

Ans. I am familiar with it. I was in consultation with Mr. Russ when he prepared it.

Cross-Int. 123. Will you please here read so much of that bill as is extracted in the defendant's answer, and tell me whether or not it truly, fairly and accurately describes the function, uses and purposes of the perforated papers in controversy in this suit?

[*Counsel reads to witness as much of Article 6 of defendant's answer as is quoted from the original bill.*]

Ans. It does.

Cross-Int. 124. Are you acquainted at all with the Metzger Patent?

Ans. I am.

Cross-Int. 125. Is the perforated paper in itself, or in combination or application, any part of the claim in said patent?

Ans. I do not remember exactly the reading of the claims, but the perforated strip in that patent is in the form of a cylinder or tube adapted to revolve over the air passages leading to the reeds.

[*Adjourned.*]

BOSTON, Jan 13, 1886.

[Present: *Counsel as before.*]

Cross-Int. 126. Have you ever attempted or do you know of any one having attempted to copyright these perforated papers?

Ans. I have made an attempt in a certain form as attorney for the Automatic Music Paper Co.

Cross-Int. 127. Did you succeed?

Ans. I did not.

Redirect examination by J. E. MAYNADIER, Esq. of Counsel for Complainants.

Int. 128. As to the barrels of hand-organs and music-boxes and as to the supposed strip music which is an exact copy of Exhibit Strip Sheet, but unperforated; what, in your judgement, is the practical difference to the owner of the copyright of a musical composition, whether his musical composition be copied in the form of a barrel for the hand-organ or the music box, or in the form of a long strip of paper with fourteen rows of four-sided figures in common ink, or in the form of Exhibit Strip Sheet, or in the form of a sheet with figures printed in metallic ink and adapted for use in an automatic music instrument played by proper makes and breaks of an electric current?

[*Objected to as irrelevant and incompetent.*]

Ans. As hand-organs and music-boxes are constructed and arranged for operation at the present time I think the organ and the music-box in their manufacture and the duplication of the barrels for such instruments in their manufacture, would cost so much that a very limited demand for and sale of the barrel-organ and the music-box would be had, correspondingly reducing and limiting the demand for and sale of the duplicate barrels: also the demand for such instruments and duplicate barrels might be further limited because of the circumference of the barrel limiting it to tunes of a short length unless special mechanism was used in the organ to operate the barrel to allow the music to be arranged thereon in a spiral direction, whereby tunes of any length could be arranged on the barrel. There-

fore, in my judgement the sale of barrel-organs and music-boxes, and duplicate barrels therefor might not have a tendency to injure or appreciably affect the rights of the person copyrighting the musical composition. I think, however if barrel-organs and music-boxes could be manufactured and sold at a cheap price and the barrels arranged and adapted to be attached to and detached from the organ in a simple and convenient manner, and the barrels produced at a small cost, that a demand would be made for such instruments, and consequently a large demand and sale made of duplicate barrels for such instruments, and thereby have more or less injurious effect upon the rights of the person copyrighting the musical composition, provided such musical composition was copied on the barrel, as it would in some degree diminish the sale of the original musical composition and take from the person copyrighting the musical composition rights to which he is entitled. For the same reason the cost of making a musical instrument adapted to be operated by electricity by a sheet of music having its notes printed in metallic ink, although the music sheet might be produced at a small cost and sold at a small price, would interfere with the sale, and thus limit the sale of such metallic ink sheets. Although, if the instrument could be made and sold at a cheap price, a large demand for the sale of music sheets adapted to be played thereon might be made which would interfere and injure the rights of the person owning the musical copy-right. I think if a simple instrument similar to a pianoforte or a reed organ having fourteen keys to which could be applied a long strip of paper with fourteen rows of four-sided figures representing notes printed thereon in any suitable ink and arranged in the form of a musical composition in such manner that it could pass before the player playing the instrument substantially in the manner shown in Exhibit Carpenter Strip Music, that if such instrument could be produced and sold at a cheap price, that it would have a large sale and consequently cause a demand for and sale of the musical sheet adapted to be applied thereto, and thereby injure the rights of the person owning the copyrighted musical composition. I think in substantially the same manner, that the sale of the perforated music sheets would have an effect to injure the rights of the person owning the copyrighted musical composition by the sale of a large number of copies of such perforated

music sheets as it would have a tendency to diminish the sales of the original copyrighted musical composition and take away rights which I think belong to the person owning the copyrighted musical composition. I think the owner of a copyrighted musical composition is entitled to the exclusive right to any form in which the musical composition can be transcribed or copied.

[Answer objected to as incompetent and irrelevant.]

Re-cross-examination by CHAS. THEO. RUSSELL, Esq., of counsel for Defendant.

Cross-Int. 129. Can the original musical composition as published be used as the barrel of the organ, or the perforated papers, are used?

Ans. I think not.

Cross-Int. 130. How could the barrel of the organ or perforated paper interfere with the sale of the musical composition as published unless it can be used for the same purpose?

Ans. Because I think many people of no knowledge or a slight knowledge of music would prefer to buy the automatic instrument and use the perforated sheets, and thus a less number of copies of the original composition would be sold; and for the reason as I have stated before, that the person owning the copyright is entitled to all forms in which the musical composition can be copied.

Attest:

EDWIN W. BROWN.

WM. A. COPELAND,
Special Examiner.

EVIDENCE FOR DEFENDANT.

TAKEN PURSUANT TO THE SIXTY-SEVENTH RULE OF THE SUPREME
COURT OF THE UNITED STATES, IN EQUITY, AS AMENDED.

BEFORE ME,

WILLIAM A. COPELAND,

Special Examiner.

BOSTON, DEC. 8, 1886, 10 A.M.

Present: J. E. MAYNADIER, ESQ., *of Counsel for Complainants.*

C. T. RUSSELL, ESQ., *of Counsel for Defendant.*

DEPOSITION OF HERMAN P. CHELIUS.

*Direct Examination by C. T. RUSSELL, ESQ., of Counsel for De-
fendant.*

Int. 1. What is your name, age, residence and business?

Ans. Herman P. Chelius; 34; Boston; music teacher.

Int. 2. How long have you been engaged in teaching music?

Ans. 13 years.

Int. 3. Are you connected with any of the institutions for teaching music?

Ans. I am connected with the Boston Conservatory.

Int. 4. Are you familiar with printed sheet music?

Ans. I am.

Int. 5. Will you please look at the Exhibit—Defendant's Exhibit Chelius, Dec. 8, 1886, [*now put in evidence*] and state whether or not you can read it, or tell the tune it represents?

Ans. I cannot, nor can any one else.

Int. 6. Can you, in and by the Exhibit itself, tell whether or not it represents music at all?

Ans. I cannot.

Int. 7. Please look at the sheet music—"Cradle's Empty, Baby's Gone"—now shown you, then at the perforated paper shown you, Exhibit Chelius, Dec. 8, 1886, and state whether or not the perforated paper can be used for or in place of the sheet music?

Ans. It cannot.

Int. 8. Please state whether or not, in your judgment, the perforated paper can be used for any purposes for which printed sheet music is used in the place of, or as a copy of the sheet music?

Ans. The perforated paper cannot be used in place of the sheet music.

Cross Examination by J. E. MAYNADIER, ESQ., of Counsel for Complainants.

Cross-Int. 9. I have marked in pencil on Exhibit Chelius, Dec. 8, 1886, at one end "4th," by which I mean to indicate the 4th line of perforations, counting from the bottom; and above that the numbers of the other lines; and have also marked the terms Do, Re, Mi, and so forth. Please look again at the Exhibit, and state whether these marks assist you at all in reading the Exhibit.

Ans. They would if I thought of them sufficiently long.

Cross-Int. 10. You cannot read the ordinary sheet music unless you know what the lines and spaces of the staff represent, can you?

Ans. I cannot.

Cross-Int. 11. Are you familiar with the tune "Cradle's Empty, Baby's Gone?"

Ans. I am not.

Cross-Int. 12. Will you oblige me by humming or whistling from the printed sheet music of "Cradle's Empty, Baby's Gone" until you get somewhat familiar with the tune?

Ans. I am familiar with it now. I have looked at it.

Cross-Int. 13. Now oblige me again, if you please, by looking at Exhibit Chelius, Dec. 8, 1886, and bearing in mind the pencil marks that I have made upon it, tell me if the notes are reproduced accurately, and if not, which of them you think are missing.

Ans. I couldn't say as any of them are reproduced accurately, and I couldn't say what is missing, or what is not missing.

[*The witness here asks if this is the proper end of the Exhibit.*]

Cross-Int. 14. What is the first note in the sheet music, disregarding the prelude?

Ans. E.

Cross-Int. 15. And what is the first note in the Exhibit Chelius, Dec. 8, 1886, taking my pencil marks as a guide?

Ans. Mi, corresponding to E.

Cross-Int. 16. What is the length of the Mi or E in both.

Ans. It is a dotted eighth.

Cross-Int. 17. What is the note next after the Mi or E in both?

Ans. C, corresponding to Do on Exhibit Chelius.

Cross-Int. 18. Please give also the length and name of the next in both.

Ans. A sixteenth note; C, corresponding to Do.

Cross-Int. 19. Can you not now whistle or hum the melody from Exhibit Chelius.

Ans. I cannot. This doesn't seem to be the right end.

Cross-Int. 20. Please consider a few more of the notes by comparing the printed sheet music, note by note, with Exhibit Chelius until you find that the notes on Exhibit Chelius are not the same in length and name as those on the printed sheet music.

Ans. May I ask a question? I am considering the soprano—the melody. Is that the part I should take? [*Counsel answers, yes.*] I see no resemblance between the perforations and the notes of the sheet music.

Cross-Int. 21. You have already answered as to the first three notes on the printed sheet music and Exhibit Chelius. Please give the length and name of the 4th in each.

Ans. I understand that I have answered two—the E and C, corresponding to Mi and Do; and if E and C correspond to the two notes in the sheet music I cannot find the next note B or Si in the Exhibit Chelius.

Cross-Int. 22. I have numbered in pencil eight of the notes. Please compare them separately with the first eight notes of the melody of the printed sheet music.

Ans. I have examined them, and find now that they are the same, as I have been told where to find them.

Cross-Int. 23. Is it your opinion that any person can read printed sheet music before he is told in some way where to find the notes?

Ans. I think he cannot.

Cross-Int. 24. Can you now whistle or hum the melody from Exhibit Chelius, Dec. 8, 1886, having learned that the lines of perforations represent the lines and spaces of a staff, and having learned, also, which line represents the tonic or Do?

Ans. I could if I knew the length of these perforations — that is, the musical length of these perforations.

Cross-Int. 25. Does not your eye readily instruct you as to the relative length of the perforations?

Ans. Not sufficiently accurate. It would be a matter of guess as to the true length of notes.

Cross-Int. 26. You will agree with me, I suppose, that a trained eye would readily determine the relative length?

Ans. I might if they were made all uniformly; they seem to be different. Notes of the same value seem to be of different sizes.

Cross-Int. 27. How did you happen to use the expression "Notes of the same value" when you were referring to holes through a paper?

Ans. From the fact that I compared the first perforation with the first note in the sheet music, and from that I inferred that the following note ought to be represented by perforations in fractions of the first perforation, or in parts.

Cross-Int. 28. Doesn't it seem to you perfectly plain, after comparing the first eight notes of the melody of the printed sheet music with the corresponding notes on Exhibit Chelius, Dec. 8, 1886, that the staff, lines and spaces on the printed sheet correspond with the lines of perforations on the Exhibit Chelius, and that the relative length of the perforations show the length of the notes?

Ans. I can only answer part of that at one time. As to the last part of that question, I would say that the length of notes are not accurately indicated, owing to the fact that in one case one perforation overlaps another, and in another case it does not. As to the first part, I would say that they correspond to the notes of the staff in value, taken separately, but does not convey the idea of the completed whole, from the fact that some perforations are contiguous to the following one, while other perforations overlap.

Cross-Int. 29. Can you form any idea how long it would take you to learn to read music like Exhibit Chelius?

Ans. That would depend upon the time I would give to it.

Cross-Int. 30. My question was, what time you think would be required to give to it in order to learn to read it?

Ans. If it would require the length of time I gave to reading the notes on the staff I would say the very least would be eight years; that is, to read it with the facility I read the notes on the staff.

Cross-Int. 31. Have you copyrighted any musical compositions?

Ans. I have had others copyright some for me.

Cross-Int. 32. Please look at the Exhibit Strip of Paper, marked Exhibit E, Chelius, and state if you can tell what the melody shown there is. [*The exhibit is now put in evidence.*]

Ans. I understand it. I can read it. I can tell what the melody is.

Cross-Int. 33. Please compare the notes marked on that paper with those on Exhibit Chelius, Dec. 8, 1886, and state whether they are the same or not.

Ans. I do not think they are exactly the same.

Cross-Int. 34. Do you think they are substantially the same?

Ans. They would be if placed in the same position, that is, one touching the other instead of overlapping the other.

Cross-Int. 35. Your meaning is not quite clear, as it is certain that the perforations do not touch. Please explain again a little more fully.

Ans. In the Exhibit E Chelius the perforations closely touch each other—I mean one begins where the other leaves off—I mean touch in the musical sense, and in Exhibit Chelius, Dec. 8, 1886, the perforations extend one over the other in some cases.

Cross-Int. 36. You mean, do you not, that the notes marked 4 and 5 in pencil on Exhibit Chelius, Dec. 8, 1886, overlap slightly more than do the corresponding notes in Exhibit E, Chelius?

Ans. I should say rather more than “slightly”—almost one-half in some cases.

Cross-Int. 37. Are you familiar with what is sometimes called the Tonic Sol Fa system?

Ans. I think I am to an extent.

Cross-Int. 38. Can you read the music on page 2 of Exhibit Boer Music, now shown you?

Ans. I can read the notes, but have not a sufficient knowledge as regards the time or pulsations.

Cross-Int. 39. Can you tell whether there is a signature or a clef on the music on page 2 of Exhibit Boer Music; or whether the flat

mark is a signature or not; or whether the sign somewhat like the letter C with a straight line through it is a clef, or merely a mark indicating common time?

Ans. I can see a clef called the C clef on the third line. I can see a flat between the 2d and 3d line, called B flat in this clef.

[*As to the last branch of the question*] It is a mark indicating common time, and the line through the C indicates *alla breve*, meaning, count two in a measure, instead of four.

Cross-Int. 40. Do you intend to testify that the same mark is both a time mark and a clef?

Ans. I do not know as regards to that.

Cross-Int. 41. There are no bars or other marks showing the measure, so far as you can see, in the music of page 2, Exhibit Boer Music?

Ans. There are not.

Cross-Int. 42. Can you read the music on page 29 of the printed matter now shown you — Exhibit In Missis Defunctorum?

[*The exhibit is now put in evidence.*]

Ans. I can.

Cross-Int. 43. Do you recognize that as an old style of music now obsolete?

Ans. I do not.

Cross-Int. 44. Do you mean that is not an old style, or that it is not obsolete?

Ans. I mean that it is an old style, and not obsolete, used very extensively at the present time.

Cross-Int. 45. What do the four lines on the staff indicate?

Ans. Location of the notes.

Cross-Int. 46. What is there to show the value of any line in the staff in that Exhibit?

Ans. I don't know what you mean by line.

Cross-Int. 47. Is there any signature or clef on the four lines of the staff of that Exhibit?

Ans. There is, a clef called F on the third line, which is changeable, as to location.

Cross-Int. 48. Which of the four lines is Do on the first staff, page 29?

Ans. It is not on the line, but in the first space, between the first and second lines.

Cross-Int. 49. Please look at the paper marked Exhibit A, Chelius, and tell me if you can recognize any tune or melody from the arrangement of the pencil marks on that paper?

[*The exhibit is now put in evidence.*]

Ans. I cannot.

Cross-Int. 50. Do you read by position ordinarily?

Ans. I read by location.

Cross-Int. 51. Suppose you were told that Exhibit A, Chelius, was plain at sight to a great number of persons who have only ordinary skill in reading music, would you think it incredible?

Ans. I would unless the person were familiar with the tune, knew it by heart, and instantly on looking at the Exhibit A, Chelius, were to associate the melody he has in his mind with the position of the notes without lines on the Exhibit A, Chelius.

Cross-Int. 52. You are aware, no doubt, that many persons are in the habit of reading music largely from the relative position of the notes, especially singers, and I mean to include persons who are imperfectly educated musically?

Ans. I know that many attempt to do so, but I have found not a single case of a person who could do it perfectly.

Cross-Int. 53. Are you familiar with the tune improperly called America in this country?

Ans. I am.

Cross-Int. 54. Can you see no resemblance, now, to the pencil marks on Exhibit A, Chelius, and that tune?

Ans. I can by stretching the imagination.

H. P. CHELIUS.

Attest:

WM. A. COPELAND,

Special Examiner.

BOSTON, Dec. 8, 1886.

[Present: *Counsel as before.*]

DEPOSITION OF JULIUS EICHBERG.

Direct examination by CHARLES T. RUSSELL, ESQ., *of Counsel for*
*Defendant.**Int.* 1. What is your name, age, residence and business?*Ans.* Julius Eichberg; 62; Boston; musician.*Int.* 2. How long have you been engaged in teaching music?*Ans.* 45 years.*Int.* 3. Are you connected with any of the institutions for teaching music?*Ans.* I am Director of the Boston Conservatory of Music; am also instructor of music in the Boston High Schools.*Int.* 4. Are you familiar with printed sheet music?*Ans.* Yes.*Int.* 5. Will you please look at Defendants' Exhibit Chelius, Dec. 8, 1886, and state whether or not you can read it, or tell the tune it represents?*Ans.* I don't believe I can.*Int.* 6. Can you, in and by the exhibit itself, tell whether it represents music at all?*Ans.* I cannot.*Int.* 7. Please look at the sheet music "Cradle's Empty, Baby's Gone," now shown you, then at the perforated paper shown you—Exhibit Chelius, Dec. 8, 1886, and state whether or not the perforated paper can be used for or in place of the sheet music?*Ans.* I don't believe it can. At any rate I couldn't use it.*Int.* 8. Please state whether or not, in your judgment, the perforated paper can be used for any purposes for which printed sheet music is used, in the place of or as a copy of the sheet music?*Ans.* I don't think it can.

Cross Examination by J. E. MAYNADIER, ESQ., of Counsel for Complainants.

Cross-Int. 9. Please compare the first eight notes of the melody, leaving out the prelude, of the printed sheet music, with the holes numbered from 1 to 8 on Exhibit Chelius, Dec. 8, 1886, and state if you see any resemblance whatever.

Ans. I see none whatever. Those are notes [*on the sheet*], and those [*on Exhibit Chelius*] are perforations.

Cross-Int. 10. What is the name of the first note on the printed sheet music—I mean the melody—and what is its length?

Ans. It is E, and its length that of a dotted eight. At our schools we would call it Mi.

Cross-Int. 11. And the second note, if you please, giving both its names and its length?

Ans. C, Do; a sixteenth note.

Cross-Int. 12. Now please look at the perforated sheet—Exhibit Chelius, Dec. 8, 1886, and having regard to the pencil marks on that sheet, state the relative lengths and positions of the 1st and 2d notes marked 1 and 2 in pencil, assuming that the rows of perforations represent the lines and spaces of the staff in the printed sheet music?

Ans. Of those holes here? Well, that—do you mean me to say how much longer that hole is than that? [*Counsel says, yes.*] I am not much of a draughtsman. I should think—you say, assuming that they represent lines and spaces, I cannot familiarize myself with that idea. This smaller of those perforations I should think to be a trifle more than one-half of the longer note. As to position, I can only say that the upper perforation was three quarters of an inch above the lower perforation.

Cross-Int. 13. Now, assuming that the first hole represents Mi or E, and is a dotted eighth in length, what would the second hole in the paper represent if it were just one-third the length of the first hole, and if the first line of perforations represented one line of the staff, the next line to that a space, and the next or third line another line of the staff?

Ans. What do you call the first line? [*Counsel points out to the witness.*] I am unfamiliar with the whole thing, and it is very diffi-

cult to put myself in mental position to recognize these as musical characters. After having said that, it is not of course difficult to say that the second hole is only half, or perhaps less than that, of the size of the first one. [*Question re-read.*] That is very difficult for me to answer. I am not familiar with any such kind of music. If it were printed music I could answer the question.

Cross-Int. 14. Please consider now the rise and fall of the first eight holes on the perforated sheet, [*Exhibit Chelius, Dec. 8, 1886*], assuming that the rows of holes represent the staff lines and spaces, and state whether they are not substantially the same in that respect as the first eight notes in the melody of the song as printed on the sheet music.

Ans. There is a very vague similarity in the position of the holes as compared with the position of the heads of the notes.

Cross-Int. 15. Now, as to the relative lengths of those first eight holes, can you not see a similarity to the relative lengths of the notes on the printed sheet music?

Ans. I cannot.

Cross-Int. 16. The first note on the printed sheet is three times as long as the second; the second one a third as long as the third; that is, the first and third are of the same length; and the second is as long as the fourth; and the fifth is four times as long as the fourth; and the sixth is the same length as the fifth; the seventh is the same as the first and third; and the eighth the same as the second and fourth? I know it is a little irksome, but I shall be obliged if you will compare the eight notes as to length as I have done, and tell me whether the comparison is exactly the same, so far as concerns the length, whether you look at the sheet music or the perforated strip.

Ans. Now, which is the 2d note? [*On the perforated sheet the Counsel points out the numbers in pencil*]. Yes. I would like to add, though, that those perforations represent to me no music.

Cross-Int. 17. You now see, do you not, that as to relative length and relative position the first eight holes compare exactly with the first eight notes on the printed sheet?

Ans. I would like to say, I see that this sign here, hole 1, is three times as long as hole 2, and hole 3 is three times as long as hole 4.

[*As to relative position*] I do not see it. I cannot acknowledge those eight holes as representing any musical idea whatever.

Cross-Int. 18. Suppose, instead of the holes, rectangular characters, varying in length and position as the holes vary, were used, would you not readily see that this would be one way of writing music and conveying musical ideas?

Ans. It would not to me.

Cross-Int. 19. But it would, would it not, to any person who was skilled in that way of writing music?

Ans. Possibly.

Cross-Int. 20. Can you read the music on page 2 of Exhibit Boer Music?

Ans. I can.

Cross-Int. 21. Can you also read the black characters and red lines on this — Exhibit In Missis Defunctorum?

Ans. I am no longer familiar with that. There was a time when I could.

Cross-Int. 22. You are also familiar with what is sometimes called the Tonic Sol Fa system, are you not?

Ans. I am not familiar with it.

Cross-Int. 23. You see no reason to doubt, do you, that there are many persons who can read this perforated strip [*Exhibit Chelius, Dec. 8, 1886,*] as freely as you can read any music with which you are familiar?

Ans. I doubt very much.

Cross-Int. 24. Do you not think that the style of musical notation used in making the perforated strip [*Exhibit Chelius, Dec. 8, 1886*] is, on the whole, far simpler than the style of notation used in the sheet music?

Ans. No, sir.

Cross-Int. 25. Please explain now why it is that you doubt that there are hundreds and thousands of persons who can read perforated sheets at sight just as readily as you can read sheet music at sight?

Ans. I have never seen anybody that could.

Cross-Int. 26. You never were familiar with these perforated sheets?

EVIDENCE FOR DEFENDANT.

Ans. I never used them before. I have seen them in instruments.
Cross-Int. 27. You never tried to learn to read them?

Ans. I did not.

Attest:

WM. A. COPELAND,
Special Examiner.

JULIUS EICHBERG.

BOSTON, Dec. 8, 1886.

[Present: *Counsel as before.*]

DEPOSITION OF EBEN TOURJÉE.

Direct Examination by CHARLES T. RUSSELL, ESQ., *of Counsel for*
Defendant.

Int. 1. What is your name, age, residence and occupation?

Ans. Eben Tourjée; 52; Boston; Director of the New England Conservatory of Music.

Int. 2. How long have you been engaged in teaching music?

Ans. 30 years.

Int. 3. Are you connected with any of the institutions for teaching music?

Ans. Yes, sir; the Conservatory, and the College of Music of the Boston University.

Int. 4. Are you familiar with printed sheet music?

Ans. Yes.

Int. 5. Will you please look at the Exhibit—Defendant's Exhibit Chelius, Dec. 8, 1886, and state whether or not you can read it, or tell the tune it represents?

Ans. No, sir.

Int. 6. Can you, in and by the exhibit itself, tell whether it represents music at all?

Ans. I shouldn't know that it did.

Int. 7. Please look at the sheet music "Cradle's Empty, Baby's Gone," now shown you, then at the perforated paper shown you, Exhibit Chelius, Dec. 8, 1886, and state whether or not the perforated paper can be used for, or in place of the sheet music?

Ans. Well, I don't know that it can. I know this — I know the fact that instruments called the orguINETTE have perforated sheets. I never saw the inside of one.

Int. 8. What I mean is, whether independent of the orguINETTE for the ordinary purposes of music, the perforated paper can be used in place or as a substitute for the printed sheet music?

Ans. Not to my knowledge.

Int. 9. Please state whether or not, in your judgment, the perforated paper can be used for any purposes for which printed sheet music is used in the place of or as a copy of the sheet music?

Ans. Well, that couldn't be a substitute for the use of music — the printed page — that is to the musician who is reading music.

Int. 10. Can you, as a musical man, taking the perforated paper simply, and knowing nothing more, read it?

Ans. No, it would be entirely worthless to me.

Cross Examination by J. E. MAYNADIER, ESQ., of Counsel for Complainants.

Cross-Int. 11. Can you read the music on page 75 of this little book — [*Exhibit Boer Music*]?

Ans. I can, but not rapidly. I am not so familiar with the clef as I am with the common F and G clef, but I can read it. The C clef is not so common.

Cross-Int. 12. Please state what the clef is on page 75?

Ans. This is what is called the C clef.

Cross-Int. 13. Do you regard the character like a C with a line across it as the clef?

Ans. No, sir.

Cross-Int. 14. What does this character denote?

Ans. It denotes the time.

Cross-Int. 15. What indicates the measures?

Ans. The measures are not indicated in that old music as they are in modern times. That system is almost entirely obsolete.

Cross-Int. 16. Please look at these sheets of music [*Exhibit In Missis Defunctorum*], and state how old it is, and whether you are familiar with it?

Ans. I have some of this at home that goes back to the eleventh century with the same notation. I also have some that was written in the fifteenth century that looks about the same as this, as near as I can remember.

Cross-Int. 17. I observe in many cases that the rectangular marks indicating notes are double the length of others. What does that denote?

Ans. I went through this some 30 years ago with a man who understood it perfectly, and I have a book in my library that describes it. I passed through my examination at that time and dropped it. As near as I can recollect that indicates the length of the note. I refer to the lines attached to the note. That is what I supposed the question asked. As to the longer note I don't know what it represents—it may be a note of double the length, but on examination I should say that it was two notes, but of the same pitch.

Cross-Int. 18. Are you familiar with the Tonic Sol Fa system, so-called?

Ans. No, sir.

Cross-Int. 19. Can you read, say, pages 4 and 5 of this book? [*Exhibit Tonic Sol Fa Music.*]

Ans. No, sir.

Cross-Int. 20. How many different styles of musical notation are you informed about, more or less?

Ans. The system that is so commonly used throughout Europe and this country. This C clef that was shown to me a short time ago I used to be somewhat familiar with years ago.

Cross-Int. 21. Please look at the first eight notes in the melody of the sheet music, disregarding the prelude, and state whether they are not the same as to relative length and relative position as the holes marked 1 to 8 in the perforated sheet? [*Exhibit Chelius, Dec. 8, 1886.*]

Ans. Just the same. I don't know but I should need a rule about that in getting down to a fine point. The first in the sheet is a dotted eighth. I don't know whether the first hole is a dotted eighth. I couldn't tell if it represented music at all, whether it represented a whole, an eighth, or a half. Hole No. 2 don't appear to me to be

quite half of No. 1. Now as to the relative positions to each other of these holes. Well, I should say they came very near to it, or approximately, if I get your idea correctly.

Cross-Int. 22. The 1st, 3d and 7th holes seem to me to be the same length; the 2d, 4th and 8th also seem to me to be of the same length, and the 5th and 6th seem to me to be of the same length. If you agree with me as to this, please state how the fact is in the printed sheet music?

Ans. Notes 1, 3 and 7 on the printed sheet are the same length, a dotted eighth; notes 2, 4 and 8 are of the same length, sixteenth notes; and notes 5 and 6 are the same length, quarter notes.

Cross-Int. 23. The relative places on the staff of the first eight notes on the sheet music are also the same, are they not, as the relative places of the eight holes on the perforated sheet, calling the rows of holes numbered with odd numbers staff lines, and the rows of holes numbered with even numbers spaces.

Ans. I know that the notes on the staff are as described. I know that there is such a thing as an orguINETTE, and these holes are supposed to in some way represent length of tones and the pitch of tones, the relative length and pitch of tones. I don't know it—I think so, however. I have never yet seen an orguINETTE.

Cross-Int. 24. Can you not now read the perforated strip slowly, taking the Do as marked in pencil?

Ans. Do these figures have anything to do with the scale? [*referring to the figures in pencil*] because I can get 1, 3 and 5, and sing it without difficulty. I should have to have it explained.

Cross-Int. 25. The figures 1, 2, 3, 4, 5, 6, 7 and 8 show merely the order of the notes; the name of the note is given in pencil on the left of each line, and each line represents a staff line or a staff space. With this information is there any difficulty whatever, except the want of practice, in reading the perforated strip?

Ans. I should think not. I should think I could learn to read it with that information. I didn't get that idea before.

Cross-Int. 26. Do you see any reason why anyone of ordinary ability could not readily learn to read the perforated strip music at sight?

Ans. There might be difficulty in the matter of the length or size

of the holes; and then the pitch, how are we going to get that? I mean by the eye, not on the machine. I should think that would be a difficulty. I shouldn't think it could ever be accomplished—the reading of the music so readily as our ordinary staff notation.

Cross-Int. 27. Now please read the melody from the printed sheet until you get somewhat familiar with it, and then see if you cannot read the same melody from the perforated sheet, bearing in mind what has been said about the lines of holes being like the staff lines and spaces, and the length of each hole showing the relative length of the note.

Ans. Taking this upper one to be the Mi, [*witness sings from the perforated sheet, and says*] yes. I am uncertain about the length of the holes. If you tell me that this hole [*referring to the first*] represents the first note of the printed music I shall know it, but it is something you must get familiar with.

Cross-Int. 28. Can you read the pencil marks on Exhibit A, Chelius?

Ans. There ought to be some lines there. I think I can get at it.

Cross-Int. 29. Will you be kind enough to sing it?

Ans. [*Witness sings.*]

Cross-Int. 30. What is the name of the tune?

Ans. The tune is called "America" in American books, but it is "God Save the Queen."

Re-direct examination by C. T. RUSSELL, ESQ.

Int. 31. Independent of the printed sheet of music and of the numbers and syllables given you in pencil on the perforated paper, could you read the perforated paper as music at all?

Ans. I couldn't at present without some lessons, without instruction.

Int. 32. Is there anything on the perforated paper in and of itself that indicates musical notation?

Ans. Well, you mean independent of statements in my presence? I confess that before I came in here I shouldn't have known that it had anything to do about music. I never saw one before.

Re-cross examination by J. E. MAYNADIER, Esq.

Cross-Int. 33. And the first time you ever tried to read a perforated strip was when you sung the melody from it at my request, was it not?

Ans. No, I have seen a little piece of paper not bigger than the palm of my hand, but I have never seen one like this before [*referring to Exhibit Chelius, Dec. 8, 1886.*]

Cross-Int. 34. Did you learn to read the small piece that you saw before?

Ans. No, I did not.

EBEN TOURJÉE.

Attest:

WM. A. COPELAND,
Special Examiner.

[*Adjourned to Monday, Dec. 13, 1886, 10 A.M.*]

BOSTON, Dec. 13, 1886, 11 A.M.

[*Present: Counsel as before.*]

DEPOSITION OF ALEXANDER MCTAMMANY.

Direct-examination by CHARLES T. RUSSELL, Esq., of counsel for Defendant.

Int. 1. What is your name, age, residence and occupation?

Ans. Alexander McTammany; 37; Worcester, Mass.; manufacturing organette music paper.

Int. 2. Are you any relation to the defendant? If so, what?

Ans. I am brother.

Int. 3. How long have you been engaged in manufacturing organette music paper?

Ans. About two years.

Int. 4. Have you ever been engaged in any occupation connected with music?

Ans. I have taught vocal music and conducted choirs.

Int. 5. Are you familiar with printed sheet music?

Ans. I am.

Int. 6. Will you look at the exhibit Defendants' Exhibit used in taking depositions Dec. 8, 1886, "Cradle's Empty, Baby's Gone," and state whether or not you have any difficulty in reading it at sight.

Ans. I have not.

Int. 7. Is there any difficulty in reading sheet music, by a musician, at sight?

Ans. A musician is supposed to be able to read ordinary music at sight.

Int. 8. What do you do in your occupation of manufacturing organette music paper?

Ans. I cut the music paper.

Int. 9. Do you or not mean by that, that you cut the perforated sheets that are used in playing the organette?

Ans. I do the perforating.

Int. 10. And from what is the perforating done? What do you have to cut from?

Ans. We take a copy of a piece of music that we want made, and place it over a few blank strips of paper and punch through the piece that we want. After the perforations are all punched through, we take the pattern off, and we have several duplicates of the pattern.

Int. 11. For what are these perforated papers, when completed, used?

Ans. They are used in connection with an organette. When placed in an instrument called an organette, and the mechanism of the organette put in motion, it will play a tune.

Int. 12. Are they, or can they, be used for any other purpose?

Ans. Not to my knowledge.

Int. 13. Will you please listen to paragraph VI. in the complainants' original bill [*counsel reads to witness the paragraph referred to*] and tell me whether or not it correctly and fully describes the use and purpose of this perforated paper?

Ans. It does.

Int. 14. Are, or can, such perforated papers be used for any other purpose, to your knowledge?

Ans. To the best of my knowledge they cannot successfully be used for any other purpose.

Int. 15. Are you or not familiar with these perforated papers?

Ans. I am familiar with them as far as my business carries me.

Int. 16. Please look at Defendant's Exhibit Chelius, Dec. 8, 1886, and state whether or not, independent of any knowledge derived from outside the perforated paper, you can read it, or tell the tune it represents?

Ans. In the absence of the name of the tune preceding the perforations, it might take me a week to read the composition. I might be able to read it in an hour, but never could read it in proper time or expression.

Int. 17. Could any musician skilled in reading sheet music, merely, in your judgment, read it?

Ans. I should say not.

Int. 18. Independent of all outside knowledge, that is everything, is there anything in that perforated paper to indicate musical expression or notation?

Ans. To a person who had never seen a perforated music sheet, and had no knowledge of there being such a thing, would see nothing about this perforated sheet that represents music.

Int. 19. Could it or not, in your judgment, be used as a substitute or in place of, or as a copy of ordinary sheet music, as such music is used by all persons playing it, or singing it in the ordinary manner?

Ans. It could not.

Cross-examination by J. E. MAYNADIER, Esq., of counsel for Complainants.

Cross-Int. 20. I am going to read your 18th answer with a slight change, namely:

To a person who had never seen an ordinary music sheet and had no knowledge of there being such a thing, would see nothing about this ordinary sheet that represents music.

Do you think that your answer is true with the change that I have made?

Ans. I don't understand the change from mine.

[*Question re-read*]. They would not see it.

My answer is true to the change.

Cross-Int. 21. In your 10th answer you say, in substance, we take a copy of a piece of music that we want made and place it over the blank strips and use the perforations in the copy as a guide to punch by. Where do you get the copy referred to in that answer?

Ans. About two years ago we bought out part of the effects of one George O. Knox who was engaged in the business, and among his effects we had those patterns spoken of.

Cross-Int. 22. Do you know where you got the copy for which you punched the perforated music in question in this suit—I mean “Cradle’s Empty, Baby’s Gone”?

Ans. I do not.

Cross-Int. 23. You know it was not bought from George O. Knox, do you not?

Ans. I could not say.

Cross-Int. 24. Please answer the question more definitely.

Ans. We got some patterns from George O. Knox. At the time he quit manufacturing, we had a large box of perforated music paper in New York city consigned to a certain party; we had it brought back and used the contents as patterns to some extent. This piece of perforated paper in question may have been in the box spoken of.

Cross-Int. 25. You have more than once used perforated music paper sold by the Automatic Music Paper Co. as a pattern to make duplicates from?

Ans. We have to some extent, but not entirely.

Cross-Int. 26. Where do you get patterns for compositions not among the patterns you bought from Knox?

Ans. We have not added any new tunes to our catalogue of tunes since Mr. Knox quit the business.

Cross-Int. 27. Do you mean except “Cradle’s Empty, Baby’s Gone”?

Ans. “Cradle’s Empty, Baby’s Gone” was on our catalogue of tunes while Mr. Knox was in the business.

Cross-Int. 28. Do you mean that you did not cut perforated music sheets until after you bought out Mr. Knox?

Ans. We did not—not since 1882, or sometime prior to 1882.

Cross-Int. 29. But Mr. Knox supplied you with all the copies of perforated sheet music for some years before you bought him out?

Ans. He did.

Cross-Int. 30. Did you ever compare one of the McTammany copies of "Cradle's Empty, Baby's Gone," with one of the Automatic Music Paper Co.'s copies?

Ans. I did not.

Cross-Int. 31. How long have you been engaged in making duplicates of this perforated sheet music?

Ans. About two years.

Cross-Int. 32. Can you not now read Exhibit Chelius, Dec, 8, 1886?

Ans. I can read it, I presume, but being somewhat familiar with it, I will read it largely from memory and not from sight.

Cross-Int. 33. Do you think that the thing now shown you — Exhibit In Missis Defunctorum — is a copy of a musical composition?

Ans. I see some musical characters here, and that is all I have to tell me that it is a musical composition. I would not swear that it was.

Cross-Int. 34. You can't read it, and you can see no marks indicating time or expression?

Ans. I cannot read it at sight. I can see some characters of expression. I should call them characters of expression. I see no characters representing variety of measure, or time.

Cross-Int. 35. Can you read it at all, at sight or otherwise?

Ans. I cannot read it at sight. If I had a clue to the key tone I presume I could read it.

Cross-Int. 36. Please point out what you think are marks of expression in that exhibit.

Ans. Perpendicular lines drawn across the staff determine the end of a measure or strain, showing the tones that should receive the accent from those that should not.

Cross-Int. 37. Can you read the music on pages 292 and 293 of the book now shown you — Exhibit Boer Music?

Ans. I can make no musical sense out of it.

Cross-Int. 38. And can see no marks of either time or expression?

Ans. I cannot.

ALEX. MCTAMMANY.

Attest:

WM. A. COPELAND, *Special Examiner.*

Boston, Dec. 13, 1886, 2 P. M.

[Present: *Counsel as before.*]

DEPOSITION OF GEORGE FISHER.

Direct-Examination by C. T. RUSSELL, Esq., of counsel for Defendant.

Int. 1. What is your name, age, residence and occupation?

Ans. George Fisher; 65; Cambridge, Mass.; music teacher.

Int. 2. How long have you been engaged in teaching music?

Ans. About 20 years—15 to 20 years specially in teaching. I have been engaged in it all my life-time, but not specially engaged in teaching.

Int. 3. Are you engaged in any institution for teaching music? If so, what?

Ans. Well, I have a music school out there, which we call the Cambridge Conservatory of Music, of which I am the proprietor.

Int. 4. Will you please look at the exhibit—Defendant's Exhibit Chelius, Dec. 8, 1886—and state whether or not you can read it, or tell the tune it represents.

Ans. I cannot.

Int. 5. Can you, in and by the exhibit itself, tell whether or not it represents music at all?

Ans. Nothing, only from hearsay. I have been told that it does, but I shouldn't know.

Int. 6. In and of itself has the perforated paper shown you any indication of musical expression or annotation?

Ans. I see nothing of the kind in it.

Int. 7. Please look at the sheet music "Cradle's Empty, Baby's Gone," Defendant's Exhibit used in depositions of Dec. 8, 1886, and then at the perforated paper shown you, Defendant's Exhibit Chelius, Dec. 8, 1886, and state whether or not the perforated paper can be used for or in place of the sheet music?

Ans. It couldn't in my case. I should get no idea from it at all.

Int. 8. Please state whether or not, in your judgment, the perforated paper can be used for any purpose for which printed sheet music is ordinarily used in the place of, or as a copy of the sheet music?

Ans. For any purpose?—it can be used for the purpose that it is

used for, but not for any purpose of which I know. The artists who cut this out can use this music—the sheet music—to cut this perforated music out, I suppose. I don't know.

Int. 9. What I mean is, can the perforated paper be used by the musician in playing or singing in place of, or as a substitute for, the sheet music?

Ans. No, it cannot generally. I suppose that the man who is capable of taking this sheet music and cutting that out—the perforated music—would be capable of reading it back again from that, the perforated paper.

Cross examination by J. E. MAYNADIER, ESQ., of Counsel for Complainants.

Cross-Int. 10. Please look at the piece of paper now shown you, marked Complainants' Exhibit Orchestrone Music, and be kind enough to state what the clefs may possibly represent or indicate in your judgment?

[The exhibit is now put in evidence.]

Ans. Well, there are two clefs here, one represents the G clef and one the F clef. The F clef is the bass clef. I don't mean to say that these punctures—they don't represent any clef to me—these perforations. Here are some characters that do *[pointing to the two characters in the margin.]* Those represent different clefs.

Cross-Int. 11. By the aid of those clefs can you make out the musical composition on the paper Exhibit Orchestrone Music?

Ans. I cannot.

Cross-Int. 12. Please look at this paper—Complainants' Exhibit Orchestrone Music No. 2—*[now put in evidence]* where each line of holes is marked with the letter of the note which each line of holes represents, and where the clefs indicate precisely what they do in common sheet music, and state whether you can make out the musical composition?

Ans. Well, I could not make out any musical composition. I know that all these letters on the margin are musical characters and represent something in music—represent notes.

Cross-Int. 13. I have numbered a series of notes—32 in all—upon a third perforated piece of paper *[now put in evidence and*

marked *Complainants' Exhibit Orchestrone Music No. 3*]. Will you oblige me by examining all three of the pieces of paper, and sounding each note in succession as numbered on the third, according to their names, as indicated on the second?

Ans. Well, this third one seems to be the same as the others. It seems to be. I should say it was from a casual—well, these three seem to be the same perforations precisely, I should say, and those figures don't indicate anything to my mind without explanation.

[*Question re-read.*] That is, you want I should pick out what all these letters would be according to the marks on No. 2? [*Counsel says, yes.*] I think I could do it after a long time. Here are the tables all here, but it conveys no idea to look at it. Well, I don't know that I understand exactly what you want me to answer. Of course I can find B on the 2d paper and I can go along and find it on No. 3, and the same with F sharp, and so forth. Well, no, come to look at it, here is B on No. 2, numbered 8, 9, 10 and 11 on No. 3, and No. 15, 19, 26 and 30. And come to look it through it don't convey any idea.

Cross-Int. 14. Please sound the 1st, 2d, 3d, 4th, 5th, 6th, 7th, 8th, 9th and 10th notes in order, as numbered on the 3d paper.

Ans. Well, these 8, 9, 10 and 11 are the same note, but of different lengths. [*Question re-read.*] Well, do you want I should sing? [*Counsel says, yes.*] Well, I couldn't do it.

Cross-Int. 15. With the information given you from the 2d paper, can you not sound the notes marked 1 and 2 on the 3d paper?

Ans. Well, no, I don't think I could with any accuracy.

Cross-Int. 16. What are the names of the notes marked 1 and 2 on the 3d paper?

Ans. They are both G, according to the 2d paper.

Cross-Int. 17. What difficulty have you in sounding these two G's?

Ans. Well, do you mean making a musical sound with my own voice? [*Counsel says, yes.*] I have no difficulty in sounding G any time.

Cross-Int. 18. And what is the 3d note as numbered on the 3d paper?

Ans. F sharp.

Cross-Int. 19. What the 4th?

Ans. E.

Cross-Int. 20. What the 5th, 6th and 7th?

Ans. Well, the 5th is D, the 6th is G, the 7th is A.

Cross-Int. 21. And what the 8th?

Ans. The 8th is B, and so is the 9th, 10th and 11th.

Cross-Int. 22. Will you not now oblige me by sounding the first eight notes in order as numbered on the 3d paper?

Ans. Well, you want I should sound them, or merely call them off? [*Counsel says, sound them.*] Well, it would be a long process. I might work it out after a while. I couldn't make any music out of them.

Cross-Int. 23. Please sound them as well as you can, in the order as numbered.

Ans. Well, I see now what it is—it is "Old Hundred," after puzzling on it. [*Witness sings by syllable.*] I know the rest. I can sing it as long as you want to.

Cross-Int. 24. Please look at the first eight notes on this printed music, and compare them with the holes marked 1 to 8 on this perforated strip—Exhibit Chelius, Dec. 8, 1886, and then sound the notes on both, and say whether they are the same or not?

Ans. I should have to figure out mathematically. I could sing these notes [*on the printed sheet.*] I couldn't sing it from this [*the perforated paper.*]

Cross-Int. 25. Please give the 1st note on the printed sheet, and see what the note marked 1 is on the perforated sheet, and so with the 2d note in both, and so on until you have compared the eight, and state whether they are alike or not in any way? State first the name and length of the notes in order.

Ans. The 1st note is E, and is a dotted 8th note. [*The witness reads from the printed sheet music.*] The 2nd is C, a 16th note; the 3d is B, a dotted 8th; the 4th is D, a 16th; the 5th is C, a quarter note; the 6th is G, a quarter note; the 7th is A, a dotted 8th; the 8th is C, a 16th. I don't know what it is on the perforated sheet, only I suppose it is intended to represent those notes on the printed sheet. I don't know that it is.

Cross-Int. 26. You see the relative lengths of the holes, 1 to 8, are

the same as the relative lengths of the notes on the printed sheet, do you not; that is, the 1st, 3d and 7th are of the same length in both the printed and perforated sheet; the 2d, 4th and 8th are the same length in both; and the 5th and 6th are of the same length in both?

Ans. The 1st note on the printed sheet is three times as long as the 2d, while on the perforated sheet the 1st hole is not more than twice as long as the 2d. The proportions are not the same.

[*Question re-read.*] Well, I see they appear to be the same, but the 1st is not the right proportion to the 2nd, nor the 3d to the 4th; there seems to be about the same discrepancy as between the 1st and 2d, but that can be determined by measuring; the 1st ought to be three times as long as the 2d, and the 3d should be three times as long as the 4th.

Cross-Int. 27. Please look at the perforated sheet now shown you, marked Complainants' Exhibit Aeolian Music [*now put in evidence*], and state whether that is more correct according to your eye, so far as concerns these first eight notes?

Ans. These are not numbered. I can't tell exactly. Is this the same piece of music? [*Counsel answers, yes.*] Well, I see that it is the same, come to study into it more closely, and those proportions are more accurate. Nobody would think of playing from it, or singing; but by close observation I see that this [*Exhibit Aeolian Music*] is the same as that [*Exhibit Chelius, Dec. 8, 1886*], and that [*Exhibit Chelius, Dec. 8, 1886*] is the same as that [*Defendants' Exhibit used in depositions of Dec. 8, 1886*].

Cross-Int. 28. Have you any copyrights for musical compositions?

Ans. I have not.

Re-direct Examination by C. T. RUSSELL, ESQ., of Counsel for Defendants.

Int. 29. Have the papers marked Complainants' Exhibit Orchestrone Music Nos. 1, 2 and 3, independent of the marks that have been put on the margin, or applied to the holes, any musical significance or expression to the eye?

Ans. None whatever.

Re-cross examination by J. E. MAYNADIER, Esq.

Cross-Int. 30. Do you read by position, or by letter, or name of the notes?

Ans. Well, I read from my knowledge of what every note represents on the staff.

Cross-Int. 31. Are you aware that many persons have a habit of reading by position?

Ans. Well, I say I read from position, by knowing what every note is in that position.

Cross-Int. 32. Suppose you were told that hundreds of persons could read these perforated strips at sight by reason, of course, of long familiarity with them and long practice, would you see any reason to doubt the truth of that statement?

Ans. Well, I think if any person that I knew was truthful should tell me so I should have no reason to doubt it; that is, I don't think it would be an impossibility to learn it.

Cross-Int. 33. Can you form any judgment as to whether it is more difficult to learn to read these perforated strips at sight than it is to learn to read the ordinary printed music at sight?

Ans. Well, I should say it wasn't as plain as the printed music at sight. I could probably learn to read the Greek alphabet, but I probably never shall.

GEORGE FISHER.

Attest:

WM. A. COPELAND,
Special Examiner.

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Opinion of the Court 146

The following is the Opinion of the Court, in accordance with which the Bill of Complaint in this cause was dismissed.

Circuit Court of the United States,

DISTRICT OF MASSACHUSETTS.

IN EQUITY.

No. 1933.

WILLIAM H. KENNEDY ET AL. v. JOHN MCTAMMANY, JR.

OPINION OF THE COURT.

[JANUARY 27, 1888.]

COLT, J. This case has been thoroughly presented to the court. It is admitted that the plaintiffs are the owners of a valid copyright in a certain song and musical composition, entitled, Cradle's Empty, Baby's Gone, and that the defendant makes perforated papers which, when used in organettes produce the same music. The sole question in issue is whether these perforated sheets of paper are an infringement of copyrighted sheet music.

To the ordinary mind it is certainly a difficult thing to consider these perforated strips of paper as sheet music. There is no cleff, or bars, or lines, or spaces, or other marks which are found in common printed music, but only plain strips of paper with rows of holes or perforations.

Copyright is the exclusive right of the owner to multiply and to dispose of copies of an intellectual production. Drone on Copyright, 100. I cannot convince myself that these

Opinion of the Court.~~KENNEDY ET AL. v. METAMORPH.~~

perforated strips of paper are copies of sheet music within the meaning of the copyright law. They are not made to be addressed to the eye as sheet music, but they form part of a machine. They are not designed to be used for such purposes as sheet music, nor do they in any sense occupy the same field as sheet music. They are a mechanical invention made for the sole purpose of performing tunes mechanically upon a musical instrument. The bill itself states that they are adapted and intended for a use wholly different from any use possible to be made of the ordinary sheet music. Their use resembles more nearly the barrel of a hand organ or music box.

The arguments urged by the complainants while forcibly put do not seem to me to be wholly sound, or entirely applicable to this case. It is said that sheet music may consist of different characters or methods, as for example the Sol Fa method, and that the perforated strips of the defendant are simply another form of musical notation, but the reply to this is that they are not designed or used as a new form of musical notation. If they were the case would be different. Again it is said that they can be used as sheet music the same as the Sol Fa method, but the answer to this is that they are not so used. While it may not be denied that some persons by study and practice may read music from these perforated strips, yet as a practical question in the musical profession or in the sale of printed music, it may be said that they are not recognized as sheet music. The question is not what may be done as an experiment but whether in any fair or proper sense these perforated rolls of paper made expressly for use in a musical instrument can be said to be copies of sheet music. The complainants further suggest that the Sol Fa copy, or the raised copy for the blind, do not take the place of printed music, in reply to which it may be said that their

purpose and object is to supply the place of printed music, and that they subserve the same purpose. I find no decided cases which directly or by analogy support the position of the plaintiffs, and it seems to me that both upon reason and authority they have failed to show any infringement of their copyright, and that therefore the bill should be dismissed.

Bill dismissed.

1

CIRCUIT COURT OF THE UNITED STATES,

District of Massachusetts.

THE CASE THIS CASE THIS CASE THIS CASE THIS CASE
In Equity.
THE CASE THIS CASE THIS CASE THIS CASE THIS CASE

No. 1933.

WILLIAM H. KENNEDY et al.

v.

JOHN McTAMMANY, Jr.

THE CASE THIS CASE THIS CASE THIS CASE THIS CASE

ASSIGNMENT OF ERRORS and PRAYER FOR REVERSAL.
(Filed June 4, 1888.)

In the above entitled suit, the complainants, having appealed from the decision of the Court and the decree in pursuance thereof dismissing the bill, assign the following errors in the said decision and decree, to wit:

First. In finding that the perforated strips made and sold by the defendant are not copies of complainants' copyrighted musical composition.

Second. In not finding that the use to which said perforated sheets are put by defendant is immaterial.

Third. In not finding that it is immaterial whether said perforated strips made and sold by defendant are recognized by the trade as sheet music.

Fourth. In not finding that said perforated strips might be used as sheet music.

Fifth. In finding that the intent of the defendant was material.

Office of the Secretary of the Interior

Department of the Interior

Washington, D. C.

April 10, 1900.

WILLIAM H. RICHARDS, Esq.

San Francisco, Cal.

Dear Sir:

I have the honor to acknowledge the receipt of your letter of the 4th inst. in relation to the application for a patent for the improvement in the method of treating the surface of the earth, and in reply to inform you that the same has been forwarded to the proper authorities for their consideration.

I am, Sir, very respectfully,
Yours very truly,
J. M. Smith, Secretary.

Very truly,
J. M. Smith.

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL.

Sixth. In not finding that the absence of the clef and of bars or lines or spaces, or other minor marks which are found in common printed music, was immaterial.

Seventh. In not finding that a true test whether the perforated strip was or was not a copy of the copy-righted musical composition is whether the former can be read by the eye or by the hand; or whether the former is a record of substantially the same intellectual production of which the latter is a record.

Eighth. In not finding that any marks or character whatever which are the sign of an intellectual production, or which in any way whatsoever convey to the intellect an intellectual production, is a copy of the marks or characters of the copyrighted composition.

Wherefore complainants pray that said decision be reversed.

By their Solicitor,

J. E. MAYNADIER.

UNITED STATES OF AMERICA.

MASSACHUSETTS DISTRICT, ss.

I, JOHN G. STETSON, Clerk of the Circuit Court of the United States for the First Circuit and District of Massachusetts, certify that the foregoing is a true copy of the record of said Circuit Court in the cause in equity, entitled,

WILLIAM H. KENNEDY et al.,
Complainants,

v.

JOHN McTAMMANY, Jr.,
Defendant,

in said Circuit Court determined, and of all proceedings therein, and of the Opinion of the Court, and of the Complainants' Assignment of Errors and Prayer for Reversal therein.



In testimony whereof I hereunto set my hand and affix the seal of said Circuit Court, at Boston, in said District, this twentieth day of June, in the year of our Lord one thousand eight hundred and eighty eight and of the Independence of the United States the one hundred and twelfth.

John G. Stetson,
Clerk.

Bond.

[BOND TO PARTY ON APPEAL.]

152

Know all Men by these Presents,

That WE, William H. Kennedy of Brooklyn in the State of New York, and the Automatic Music Paper Company, a corporation under the laws of the State of Massachusetts, located at Boston in said state, as Principals, and George B. Kelly and Edward L. Rand of said Boston as sureties, are held and firmly bound unto John McTammany, Jr., of Worcester in the State of Massachusetts, in the full and just sum of Five Hundred Dollars

to be paid to the said John McTammany, Jr.,

his certain Attorney, Executors, Administrators, or Assigns; to which payment well and truly to be made we bind ourselves, our Heirs, Executors, and Administrators, ^{successors and assigns} jointly and severally, by these Presents.

Sealed with our seals, and dated the eighth day of March in the year of our Lord one thousand eight hundred and eighty eight.

WHEREAS lately at a Circuit Court of the United States within and for the District of Massachusetts

in a suit in equity depending in said Court between the said William H. Kennedy and the said Automatic Music Paper Company, Complainants, and the said John McTammany, Jr., Defendant,

decree was rendered against the said Complainants

and the said Complainants

having obtained an Appeal to remove the said cause to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said Defendant

citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now the condition of the above obligation is such, that if the said Complainants

shall prosecute their said Appeal to effect, and answer all damages and costs, if they fail to make their plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

Signed, sealed and delivered
in presence of

W. A. Webber to W. H. Kennedy.
John L. Ginn } to Kelly
Wm. K. Brigham } & Rand.
Approved:

WILLIAM H. KENNEDY.

[L. S.]

AUTOMATIC MUSIC PAPER CO.

By Geo. B. Kelly, Pres.

[L. S.]

Edw. L. Rand, Treasurer.

GEO. B. KELLY.

(L. S.)

EDW. L. RAND.

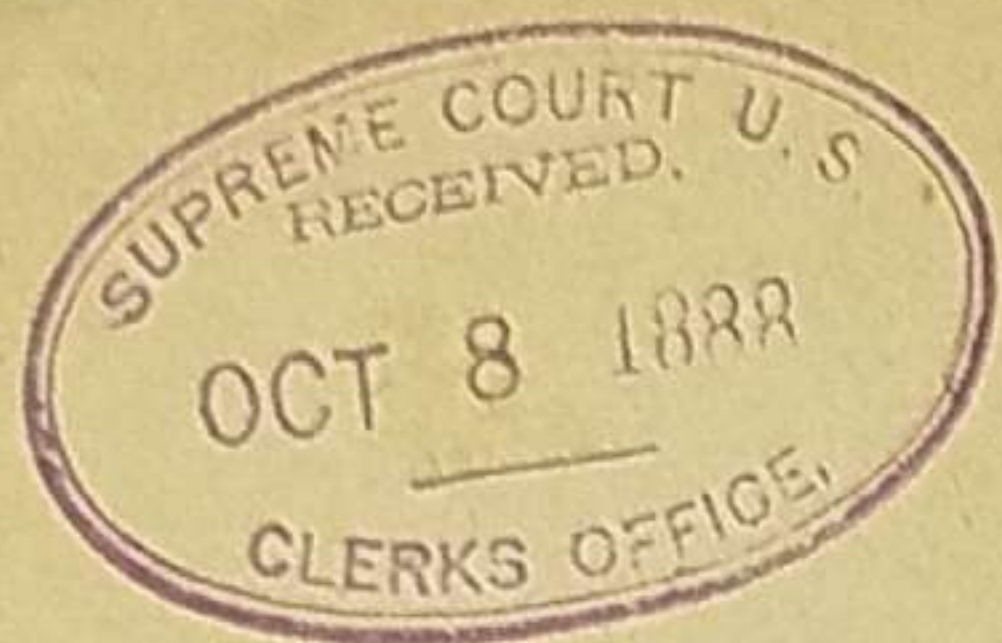
(L. S.)

A true copy of the bond taken by the Judge at the time of allowing the Appeal named in said bond, which bond is on file in the office of the clerk of the Circuit Court of the United States, for the First Circuit and District of Massachusetts.

Attest:

John G. Stetson

Clerk U. S. C. C., Mass. Dist.



Massachusetts
C. C. U.S.

No. ~~1477~~. ~~843~~ 577 168

William H. Kennedy and
The Automatic Music Paper
Company,

Appellants

13212

vs.

John W. Gamman Jr.

Filed October 8, 1888.

United States of America, ss:

The President of the United States of America,

To the Honorable the Judges of the

Court of the United States for the

District of

Circuit

Massachusetts

(Seal)

GREETING:

Whereas, lately in the *Circuit* Court of the United States
for the *Massachusetts* District of *Massachusetts* before you,
or some of you, in a cause between *William H. Kennedy*
and *The Automatic Music Paper Company*,
Complainants, and *John M. Samman, Jr.*,
defendant, wherein the decree of the
said Circuit Court, entered in said cause
on the 27th day of January, A.D. 1888,
was in favor of the said defendant,
John M. Samman, Jr., and against the
said Complainants

as by the inspection of the transcript of the record
of the said Circuit
Court, which was brought into the Supreme Court of the United States by
virtue of *An appeal*
agreeably to the act of Congress,
in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord
one thousand eight hundred and ninety-~~one~~^{ONE}, of the said Supreme Court,
this cause ~~being~~^{having been} called for hearing in its regular order, and it appear-
ing to the Court that the parties have failed to print the transcript
of the record, It is therefore ~~therefore~~^{fore} in pursuance of the 10th rule of this Court,
now here ordered, ~~and~~ adjudged, and decreed by this Court,
that this appeal ~~be~~^{be}, and the same is
hereby, dismissed with costs; And that the
said defendant recover against the
said complainants, William H. Kennedy
et al, Twenty dollars for his costs
herein expended and have execution
therefor.

January 15, 1892.

Supreme Court of the United States.

October Term, 1888. No. 1222

William H. Kennedy et al, Complainants,
Appellants,

vs.

John McTammany, Jr., Defendant,
Appellee

The Clerk will enter my appearance as Counsel for the

Appellee
Chas. Geo. Russell
27 State St.,
Boston, Mass

NOTE.—Must be signed by a member of the Bar of Supreme Court
United States. Individual and not firm-names should be signed.

Supreme Court of the United States.

October Term, 1888. No. 1292

William H. Kennedy et al, Complainants
Appellants

vs.

John M. Tammeling Jr. Defendant
Appellee

The Clerk will enter my appearance as Counsel for the

Appellants

J. L. Maynard
33 School St

Boston, Mass

NOTE.—Must be signed by a member of the Bar of Supreme Court
United States. Individual and not firm-names should be signed.

Washington, D.C. *per R.M.*

168
13212
Telephone No. 2795.

C. T. & T. H. RUSSELL,
ATTORNEYS AND COUNSELLORS,
Nos. 23, 24, 25, 26 & 27 Brazer's Building,
27 STATE STREET.

Th.
Chas.
William
Arthur H.

Boston, February 8, 1892.

Dear Sir:--

Has the case of Kennedy et al vs. Mc.
Tammany been reached and dismissed, under the
Rule? If so, we suppose we do not get the man-
date until the Court rises. Are we right?

Very truly yours,

C. T. & T. H. Russell

James H. McKenney, Esq.,

Clerk Supreme Court,

Washington, D. D.

case of Kennedy

16
C. T. & T. H. Russell, Esq.,

Boston, Mass.

Dear Sir:

Boston, May 18, 1892.

As requested by yours of the 18th inst., I enclose
the mandate in case of Gandy et al. vs. McTammany, No. 108 of
Oct. Term, 1891.

Please acknowledge receipt.

soon as convenient. Yours truly,
Kennedy et al. vs. McTammany, James H. McKenney, of
any costs, if any there be, that we *par* be enti-
tled to in the Supreme Court, and oblige,

Yours very truly,

C. T. & T. H. Russell

168
13212

C. T. & T. H. RUSSELL,
ATTORNEYS AND COUNSELLORS,
Nos. 23, 24, 25, 26 & 27 Brazer's Building,
27 STATE STREET.

Telephone No. 2795.

Cha
Thon
Chas.
William
Arthur H.

Boston, May 18, 189

James H. McKenney, Esq.

Dear Sir:--

We see that the Court has adjourned, and we therefore request that you will send us, as soon as convenient, the mandate in the case of Kennedy et al. vs. McTammany, with a taxation of any costs, if any there be, that we may be entitled to in the Supreme Court, and oblige,

Yours very truly,

C. T. & T. H. Russell

May 20, 1892.

John G. Stetson, Esq.

Clerk U.S. Circuit Court,
Boston, Mass.

Dear Sir:

I send mandate in case of *Reddy et al. vs. McLan-*
many, No. 168 of Oct. Term, 1891, by this to Mess. C. T. & T. H.
Russell, at their request.

I enclose receipted bill for Gle costs amounting
to \$18.45, also my check No. 4766 (on the 1. Bank of Wash'n.)
to your order for \$6.55, it being bal. of deposit of \$25.
made by you to secure costs.

Please acknowledge rec.

Yours truly,

James C. Kenney.

per *H. M.*



Clerk of U. S. Circuit Court,

DISTRICT OF MASSACHUSETTS.

JOHN G. STETSON,
Clerk.

Boston, June 25, 1892.

My dear McKENNEY,-

I thank you for the set of blanks you sent me.

I neglected to acknowledge receipt of your check No. 4766 for \$6.55 balance of deposit in No. 168, Oct. Term, 1891, Kennedy et al. v. McTammany. I have accounted for this balance to Mr. Maynadier, complainants' attorney, who made the deposit with me.

Yours truly,

John G. Stetson
Clerk.

No ans

92 June 27th

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Fee Book

AB, page *192*

Supreme Court U. S.

1888. OCT. TERM.

No.

~~1222~~, ~~43~~ *517* ¹⁶⁸

Deposit of \$

2500

by

Mr. G. Stebbins, Clerk of
Boston Mass.

Oct. 8, 188*8*

Deposit of \$

by

of

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Deposit of \$

by

of

, 188 .

No. 168.

Supreme Court of the United States.

October Term, 1891.

William H. Kennedy et al., Appellants,

vs.

John M. Tammany Jr.

Appeal from the Circuit Court of the United States
for the ~~the~~ District of Massachusetts.

This cause having been called for hearing in its regular order, and it appearing to the Court that the parties have failed to print the transcript of the record, It is, therefore, in pursuance of the 10th rule of this Court, now here ordered, ~~and~~ adjudged and decreed by this Court, that this appeal ~~be~~, and the same is hereby, dismissed with costs.

per Mr. Chief Justice Fuller,
January 15, 1892.

Nov. 14, 1901.

E. T. & T. H. Russell, Esqrs.,

Boston, Mass.

Dear Sirs:

James H. McKenney, Esq.,

Yours of the 14th inst. received. Appellants in case of Kennedy et al. vs. McTammany, No. 168 have not yet made the necessary deposit of the amount of estimated costs in order to have the record printed and when the case is reached in regular order on the docket, which will probably be early in January next, it will be dismissed with costs for failure to print. The presence of counsel will not be necessary for that purpose. Of course, in case of dismissal, the decree below appealed from stands in full force and effect.

Yours truly,

James H. McKenney,

Yours very truly per

C. T. & T. H. Russell

P.S. How does such dismissal leave the decree in the court below appealed from.

C. T. & T. H. Russell

168
13212
Telephone No. 2795.

C. T. & T. H. RUSSELL,
ATTORNEYS AND COUNSELLORS,
Nos. 23, 24, 25, 26 & 27 Brazer's Building,
27 STATE STREET.

Cha
Thon
Chas.
William
Arthur H.

Boston, November 14,

James H. McKenney, Esq.,

Washington, D. C.

Dear Sir:--

As we have as yet received no copy of the record, or intimation of its being printed, in the case of Kennedy et al vs. McTammany, No. 168, we presume it has not been printed. Will you please inform us whether we are right in this, and also if, when the case is reached, the record is not printed, the case under the rule of the Court will be dismissed without attendance of counsel at Washington?

Yours very truly,

C. T. & T. H. Russell

P.S. How does such dismissal leave the case in the court below appealed from.
C. T. & T. H. Russell

168
C. T. & T. H. Russell, Esqrs.,

Boston,

Oct. 23, 1891.

Dear Sirs:

Yours of the 21st insed. Case of Kennedy
et al. vs. McTammany, No. 168, will be reached about the
middle of January next. Appellant not yet deposited
the balance of estimated costs and the record
has not been printed.

Yours truly

ed one.

McKenney,

If not too much trouble, per *Wm*
inform us what time you think the case may be
reached, and oblige

Yours very truly,

C. T. & T. H. Russell

168
13212

C. T. & T. H. RUSSELL,
ATTORNEYS AND COUNSELLORS,
Nos. 23, 24, 25, 26 & 27 Brazer's Building,
27 STATE STREET.

Telephone No. 2795.

Chas. Thomas
Chas. The.
William E. H.
Arthur H. Rus.

Boston, October 21, 1891.

James H. McKenney, Esq.,

Washington, D. C.

Dear Sir:--

Has the record in No. 168, Kennedy et al vs. McTammany, been printed? If so, will you please send us a copy, as we have not yet received one.

If not too much trouble, will you also inform us what time you think the case may be reached, and oblige

Yours very truly,

C. T. & T. H. Russell

SUPREME COURT U.S.

—
CASE NO. 13212—